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# CHAPTER ONE

## Introduction

### 1.1 **Background**

In 1963 the European Court of Justice (ECJ) summed up what the European countries had done in forming the European Union by stating that;

‘The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals<sup>1</sup>.’

The ECJ in this case aptly described the essential elements that should constitute any attempt at regional integration. Since the creation of the internal market in the EU, the economic strength of the region increased dramatically with the regions gross domestic product (GDP) accounting 20% of the global gross domestic product in 2014<sup>2</sup>. As such the creation of these new legal regimes of international law has always been seen as a pre-requisite for economic development especially within the African context. In recognition of this African countries united to create the Organization of African Unity (OAU) and subsequently the African Union (AU). Central to the success of the AU is the efficiency of the mechanics of its recognized regional economic communities (REC's) in promoting regional integration in each particular sub-region.

The Southern African Development Community (SADC) in 1996 sought to spur economic integration in the region through integration in line with AU objectives. Since the dawn of democracy in the region, SADC has witnessed some growth in cross-border trade<sup>3</sup>. Intra-regional trade has been dominated by the more industrialized countries such as

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<sup>1</sup> Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

<sup>2</sup> IMF World Economic Outlook 2014

<http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weorept.aspx?pr.x=28&pr.y=14&sy=2014&ey=2014&scsm=1&ssd=1&sort=country&ds=.&br=1&c=998&s=NGDPD%2CPPP%2CPC&grp=1&a=1> accessed on June 12 2015

<sup>3</sup> *What are the critical issues Arising from SADC Trade Integration Process* , DPRU Brief no 00/P3 (July 2000)

South Africa and Zimbabwe<sup>4</sup>. The rest of the SADC member states have so far not been able to compete efficiently.

The trade surplus these countries enjoy is unsustainable and detrimental to regional integration. Moreover, intra-regional trade in the SADC remained significantly lower than in other regions indicating a lack of integration. Intra-regional trade in the European Union (EU) stood at 66% of total trade while for the North American Free Trade Area (NAFTA) it stood at 56%. This is considerably higher than those of SADC which stood at 11% in 2000 and further dropped to 9% in 2006<sup>5</sup>. Thus trade within SADC needs to be enhanced if any meaningful development is to transpire.

In recognition of this, the member states of SADC in 1996 signed the SADC Protocol on Trade (the Protocol) to address the discrepancies in trade. Article 3 of the Protocol specifically recognized barriers to intra-SADC trade. It came into force in 2000 after ratification of more than two thirds of member states with the aim of creating a free trade area in the region (FTA). The first step in the trade liberalization process was to be completed over a period of 8 years with periodical tariff phase down from the time the Protocol came into force<sup>6</sup>.

## 1.2 **Thesis Problem and Research Question**

It follows from the foregoing that the proposed research question is as follows;

“Is the SADC Trade Protocol adequate to meet its stated objectives and to address the problems of limited intra-SADC trade?”

This thesis will argue that although the protocol has had some impact on intra-regional trade, some provisions contained within it remain a barrier to trade. The thesis will focus on how the SADC protocol on trade can address solve the problems of intra-SADC trade. It will be argued that certain provisions within the Protocol undermine the objectives of the protocol as outlined in Article 2. These provisions include but are not limited to the rules of origin, non-harmonization of external tariffs, derogations to the

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<sup>4</sup> *What are the critical issues Arising from SADC Trade Integration Process* , DPRU Brief no 00/P3 (July 2000)

<sup>5</sup> *Southern African Development Research Network: Implementation of the SADC Protocol and Intra-SADC trade performance* (2008)

<sup>6</sup> *Southern African Development Research Network: Implementation of the SADC Protocol and Intra-SADC trade performance* (2008)

elimination of barriers in intra-SADC trade provisions found in Article 3, and inadequately tackling non-tariff measures. In examining the protocol, reference will be made to the similar provisions contained in the East African Community (EAC).

The EAC could be used in this sense to help illuminate ways in which SADC might improve its provisions in the trade protocol to stimulate intra-SADC trade. The EAC is regarded as one of the most advanced RTA's in Africa thus providing a solid foundation for comparison and providing far-reaching insight as to how to address the problem of limited intra-regional trade. The Protocol will be critically analyzed further in light of the broader SADC aims and objectives with commentary on the extent to which it assists in bringing them to fulfillment.

Ultimately it will be highlighted that the Protocol has not had a far-reaching impact as may have been envisaged. Although total exports in merchandise from the region grew from \$14 billion in 2000 to \$58 billion in 2011<sup>7</sup>, intra-SADC trade actually decreased during the same period. Most countries in SADC have actually reduced their share of exports to the SADC region during the period from 2008 to 2009 with a decrease in intra-SADC trade from \$46.6 billion to \$38.8 billion<sup>8</sup> illustrating how despite the implementation of the Protocol, problems of intra-SADC trade are not entirely resolved.

As such it is arguable that the Protocol does little to enhance trade in the region and ultimately undermines the regional integration agenda. The protocol allows Member States to grant or maintain preferential trade arrangements with 3<sup>rd</sup> countries provided they do not conflict with the objectives of SADC. This could provide insight as to the growth of exports of SADC in the same period. The protocol further fails to address the issue of a harmonized external tariff.

The lack of coherence on this issue means that SADC lacks a global, outward looking approach in regional integration which is essential if any meaningful and tangible

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<sup>7</sup> *SADC Statistics Yearbook, Intra-SADC Trade for SADC* (2011) available at <http://www.sadc.int/information-services/sadc-statistics/sadc-statyearbook/>

<sup>8</sup> *SADC Statistics Yearbook, Intra-SADC Trade for SADC* (2011) available at <http://www.sadc.int/information-services/sadc-statistics/sadc-statyearbook/>



outcomes are to be realized<sup>9</sup>. The complicated rules of origin and the lack of a clear approach to non-tariff measures also do little to address these concerns. It is against this background that it is proposed that a critical analysis of the Protocol occurs to provide insight into the mechanics of the Protocol and its impact on trade and ultimately integration in the region. The research methodology will consist of articles, journals, legislation and other relevant legal texts.

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<sup>9</sup> *Implementation of the SADC trade Protocol: Some Reflections*, Paul Kalenga

## CHAPTER TWO

# The History of Trade and Regional Integration in Southern Africa

### 2.1 **Introduction**

The proceeding discourse will articulate the historical background of trade in southern Africa illustrating how it rose to be integral to the economic development the countries within this region. Moving from the historical context, intra-trade regional trade will be examined against the background of emerging modern challenges in the region before moving on to illuminate recent developments and efforts to encourage intra-regional trade. It will be argued that much progress has been made on this front, however southern Africa still has of challenges to address before the benefits of increased intra-regional trade and integration can have far-reaching effects on the regional economy.

### 2.2 **Regional Integration in Southern Africa: Southern African Customs Union and Central African Federation**

Regional integration and intra-regional trade in southern Africa can also be traced back to colonial times where the British colonial administrators took the view that some countries would be better off under regional integration schemes due to their small markets and economies. Thus integration was supposed seen as experiment to create larger, viable colonies that were better positioned to handle independence<sup>10</sup>. Most countries were deemed too small in terms of resource endowment to be self-sufficient. Economic development thus rendered regional integration a necessity<sup>11</sup>. One of the very first attempts was the creation of the Southern African Customs Union (SACU) established after an agreement between the British colonial administrators in what are now Botswana, Lesotho, Swaziland

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<sup>10</sup> See <http://www.britishempire.co.uk/maproom/nyasaland.htm> accessed on September 19 2014

<sup>11</sup> Samir Amin, Derrick Chitala, Ibbo Mandaza, *SADCC: Prospects for Disengagement and Development in Southern Africa* at pg 183

(referred to as the BLS states) and the newly formed Government of the Union of South Africa in 1910<sup>12</sup>. It is referred to as the oldest customs union in the world arguably making Southern Africa a pioneer in the regional integration agenda.

The agreement between these states created a common external tariff (CET) on all goods imported into the Union from the rest of the world; a common pool of customs duties as per the total volume of external trade; and excise duties based on the total production and consumption of excisable goods. It also created the free movement of SACU manufactured products within SACU, without any duties or quantitative restrictions<sup>13</sup>. The customs union agreement was renegotiated in 1969 and most recently in 2002 which entered into force in 2004. Central to the objectives of SACU was the idea to promote intra-regional trade and the integration of member states into the global economy<sup>14</sup>. This reflects recognition by the Member States of the importance of trade and regional integration in accelerating economic development. Historically, the larger and more dominant economy of South Africa sought to use SACU as a means of gaining political support from the BLS states to an increasingly isolated apartheid regime.

It follows that regional integration in southern Africa has been strongly affected by the conflict between apartheid South Africa and the rest of the region. Three distinct periods define integration in the region in this regard. Firstly, the period ending in 1980 with the independence of Zimbabwe; this made the region a “buffer zone” for the apartheid regime. Until this period integration interests were pursued by the colonial powers. Secondly, it also consisted of the period from 1980-90 where South Africa utilized political and other means to try and destabilize of the region in the wake of growing resistance to apartheid and South Africa's increased international isolation. Integration efforts were mainly concerned with reducing South Africa’s economic dominance in the region.

Finally, the region then arrived at a period of transformation as the isolation of South Africa reduced making it made an important and active player in the region. SACU

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<sup>12</sup> Christian Peters-Berries *Regional Integration in Southern Africa, A Guidebook*, Chapter 6 pg. 42

<sup>13</sup> *Brief on SACU*, Ministry of External Affairs (E& SA Division) found at <http://www.mea.gov.za/external/relations/relations%20with%20other%20regions/sacu.htm> accessed on 3<sup>rd</sup> July 2014

<sup>14</sup> Article 2 of the SACU 2002 Agreement

was able to withstand the conflict which engulfed the southern African region that has been referred to as “*southern Africa’s cold war*”<sup>15</sup>. South Africa still managed to negotiate a formula for revenue distribution giving preference to the BLS states and thus constituted an important source of income for the smaller BLS economies<sup>16</sup>.

Although Namibia was a “*de-facto*” member as it was mostly administered by South Africa it officially joined SACU in 1990 after gaining independence. It too benefited from this revenue distribution formula. South Africa consolidated its strong position within SACU as it introduced the attachment of the BLS currencies to the South African Rand which was referred to as the Rand Monetary Union (RMU) or the Common Monetary Area (CMA)<sup>17</sup>. However, Botswana left the CMA in 1976 after its economy had become strong enough to sustain its own currency<sup>18</sup>.

The new agreement in 2002 signaled a change in SACU as the post-apartheid Government of South Africa took a change in policy direction. A new formula for revenue distribution was also introduced with the establishment of the new agreement. Rather than sharing a fixed percentage of all duties amongst the four smaller economies, the new formula takes into account their socio-economic performance and developmental needs<sup>19</sup>. Previously, all SACU institutions were supported by the South African Government with no separate institutions in existence. However the new agreement established under Article 7 created the SACU Council of Ministers, the Secretariat, the Commission, National Bodies, a Tariff Board, Technical Liaison Committees and a Tribunal<sup>20</sup>.

A later attempt at regional integration in the southern African region came in the form of what was called the Federation of Rhodesia and Nyasaland or Central African Federation (CAF) which failed to survive due to African independence movements. The CAF which was in existence between 1953 and 1963 consisted of Southern and Northern Rhodesia (now Zimbabwe and Zambia) and Nyasaland (now Malawi). The federation was

<sup>15</sup> Graham, Matthew , *Cold War in Southern Africa*, in: *Africa Spectrum* (2010), 45, 1, 131-139

<sup>16</sup> , Christian Peters-Berries *Regional Integration in Southern Africa, A Guidebook*, Chapter 6, pg 43

<sup>17</sup> Jian-Ye Wang, Iyabo Masha, Kazuko Shirono, and Leighton Harris, *The Common Monetary Area in Southern Africa: Shocks, Adjustment, and Policy Challenges*,

<sup>18</sup> Christian Peters-Berries, *Regional Integration in Southern Africa, A Guidebook*, Chapter 6, pg 43

<sup>19</sup> Christian Peters-Berries, *Regional Integration in Southern Africa, A Guidebook* Chapter 6, pg 43

<sup>20</sup> *Brief on SACU*, Ministry of External Affairs (E& SA Division) found at <http://www.meaindia.nic.in/staticfile/historicalbackgroundSACU.pdf>, accessed on 7<sup>th</sup> July 2014

seen as a counter to the minority rule in South Africa<sup>21</sup> and was an attempt to suppress independence movements in Malawi and Zambia.

The CAF operated as a federal system which had a number of institutions which sought to create one large supranational body<sup>22</sup>. The structure of the CAF placed great importance on the development of Southern Rhodesia. The income generated from the Northern Rhodesia copper mines went largely to Southern Rhodesia whilst Nyasaland was utilized as a source of cheap labor<sup>23</sup>. Naturally, as Northern Rhodesia and Nyasaland gained independence to become the states of Zambia and Malawi respectively, the CAF came to an end.

By 1980 independence had reached many southern African countries but during this time the economic dichotomy of the region was largely in favor of South Africa. Following this, integration efforts shifted with the main aim of reducing apartheid South Africa's dominance in the region. These efforts involved countries that were known as the “*frontline states*” (FS) and included Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe. It was thought that regional integration between these countries was essential in order to reduce “excessive economic dependence<sup>24</sup>” on South Africa.

### **2.3 From Southern African Development Coordination Conference to Southern African Development Community**

The effort to become less reliant on the larger economy of South Africa was not the only catalyst for the establishment of the third regional economic community in Southern Africa. It was also an attempt to counter the proposal by South Africa to establish a regional body called the Constellation of Southern African States (CONSAS). Comprising of South Africa and its three independent former homelands, it was anticipated that these

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<sup>21</sup> Alistair Boddy-Evans, *Federation of Rhodesia And Nyasaland* found at <http://africanhistory.about.com/od/eraindependence/a/Federation-Of-Rhodesia-And-Nyasaland.htm>, accessed on 7<sup>th</sup> July 2014

<sup>22</sup> Christian Peters-Berries *Regional Integration in Southern Africa, A Guidebook*, Chapter 6 pg 43

<sup>23</sup> Christian Peters-Berries, *Regional Integration in Southern Africa, A Guidebook*, Chapter 6, pg. 44

<sup>24</sup> Sir Seretse Khama in SADCC (1981) op- cit., p.viii

countries would not merely expand existing economic ties, but that they would develop a common approach in the security political field<sup>25</sup>. Essentially, CONSAS was supposed to be a political buffer zone for the apartheid government. In 1980 after a long process of meetings these FS countries successfully signed and adopted the Lusaka Declaration<sup>26</sup> which established the Southern African Development Coordination Conference (SADCC). Namibia later joined after gaining independence in 1990. Although the main driving force of the SADCC was the fight against apartheid, it was a clear effort at regional integration in the region reflected by the language of the declaration.

Among their aims was the forging of links to create a genuine and equitable regional integration and the mobilization of resources to promote the implementation of national, interstate and regional policies<sup>27</sup>. Although its aim was not to create a common market however it is clear that the heads of state sought to promote trade through cooperation in specially identified areas. SADCC developed a program of action that identified defined economic activities and development projects to be pursued. Each member state took responsibility for a particular sector as the organization focused its attention on the coordination of members' development initiatives in favor of formulating a regional economic development strategy<sup>28</sup>.

Promoting the activities of member states' infrastructure and production sectors (mining, agriculture etc.) was the goal. Cooperation in the field of transport infrastructure was central to the objectives of the organization given the land-locked countries of the region's dependence on South Africa for the transport of goods. Under this Mozambique was assigned responsibility for transport and communications; Zimbabwe for food security; Angola for energy, etc. Technical units were also established in each country in order to deal with each country's relevant portfolio. The sectoral approach also fostered a

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<sup>25</sup> Deon Geldenhuys, *The Constellation of Southern African States and the Southern African Development Co-ordination Concil: Towards a new Regional Stalemate?*, The South African Institute of International Affairs (1981) at pg. 2

<sup>26</sup> Entitled *Southern Africa: Towards Economic Liberation*

<sup>27</sup> Lusaka Declaration, *Southern Africa: Towards Economic Liberation*

<sup>28</sup> Maxi Schoeman, *From SADCC to SADC and Beyond: The Politics of Economic Integration*, at pg 4

sense of common identity and common responsibility with every member, regardless of size, having a role to play<sup>29</sup>.

The Lusaka Declaration was not a legally binding instrument. This was not an effort to create supranational institutions which are a central feature of the modern regional integration models. It was in part member states' desire not to infringe their newly acquired sovereign independence from their colonial administrators<sup>30</sup>. In 1981 the member states signed the Memorandum of Understanding on the Institutionalization of SADCC. This outlined that the main institutions would be the summit of the heads of state; council of ministers; the standing committees of officials; and sectorial commissions. The understanding was further amended in 1982 to include the secretariat.

Like most African regional integration schemes, the hierarchy of the SADCC institutions placed supreme authority on the summits of the heads of state. African heads of state sought to consolidate their hard fought sovereign power through avoiding to create supranational institutions. Meanwhile, the council of ministers was made up of senior government ministers. Their role was to direct, supervise and coordinate SADCC activity<sup>31</sup>. Permanent secretaries to the ministers made up the standing committees of officials tasked with performing 'collectively for the Council the functions a permanent secretary performs for his minister<sup>32</sup>.' Sectorial commissions could be formed by the summit and once formed constituted legally binding bodies. During its period the summit only instituted two commissions; one in transport and communications and another in agriculture.

During its early years the SADCC did little to achieve a lesser degree of independence from South Africa through economic integration. The transportation and communications initiatives instituted by the body were all proving futile. The Zambia/Tanzania road highway went into liquidation in 1985, the Malawi-Beira and

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<sup>29</sup> See <http://www.trocaire.org/resources/tdr-article/southern-african-development-coordination-conference-sadcc> accessed on September 30 2014

<sup>30</sup> Brid Bowen, *The Southern African Development Conference, Trocaire Development Review*, Dublin (1990), p29-45

<sup>31</sup> Brid Bowen, *The Southern African Development Conference, Trocaire Development Review*, Dublin (1990), p29-45

<sup>32</sup> I Simba, and F. Wells, (1984) *Development Cooperation in Southern Africa*, Paris, OECD, p.20

Malawi-Nacala routes<sup>33</sup> were closed by 1982 and the Zimbabwe-Maputo route was closed in 1984<sup>34</sup>. This is reflected in the gloomy economic performance by the region from 1980 to 1986. Gross National Product (GNP) per capita dropped by 12 per cent on average during this period. Furthermore debt as a percentage of the GNP nearly tripled and the debt service ratio as a percentage of exports almost doubled in the region<sup>35</sup>. Thus the institution in 1985 decided to undertake a review in order to highlight its difficulties and institutional limitations.

Following this, SADCC started to place emphasis on trade from 1986 which paved the way for the institution to open up to the private sector for the first time in 1987<sup>36</sup>. This was supposed to act as a catalyst for the industrial development program which until this stage had received little support. This was subsequently a recurring theme in SADCC agenda until its demise in 1992. Consequently (particularly from 1987 onwards) signs of progress in achieving SADCC aims started to become apparent. In the transport sector, it became possible to fly between any of the capital cities within SADCC without using South African routes which constituted an important step towards reducing the regions heavy reliance on that country's transport routes.

Additionally it became cheaper by approximately \$400 per ton<sup>37</sup> for the region to use the Mozambican Beira port rather than South Africa's Durban port. It was estimated that 63 per cent of SADCC trade during this period went through the regions own ports rather than those of South Africa<sup>38</sup>. Specifically, Zimbabwe during this period had increased its use of the Beira corridor by 13 per cent between 1985 and 1986 which reduced its reliance on South African routes by approximately 50 per cent in 1987.

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<sup>33</sup> It was thought that these transport routes to the Mozambican ports would reduce the regions reliance on South Africa's transport routes.

<sup>34</sup> Brid Bowen, *The Southern African Development Conference, Trocaire Development Review*, Dublin (1990), p29-45

<sup>35</sup> Brid Bowen, *The Southern African Development Conference, Trocaire Development Review*, Dublin (1990), p29-45

<sup>36</sup> Brid Bowen, *The Southern African Development Conference, Trocaire Development Review*, Dublin (1990), p29-45

<sup>37</sup> AWEPA, (1987) *Southern Africa's Future and Europe's Role*, The Hague, p.9

<sup>38</sup> Africa Research Bulletin (ARB) (1989), para. 24



On the other hand, Zambia had increased its trade of copper through the use of the Beira corridor by 87 per cent<sup>39</sup>. Meanwhile by 1987 Malawi had reduced its reliance on South African routes to 50 per cent. It is clear that although the SADCC had little successes it did manage to make meaningful strides in achieving some of its objectives, particularly in its last three years.

However, to mobilize resources to promote equitable regional growth and reduce the dependence on South Africa required a large amount of external funding<sup>40</sup>. This reliance on donors to facilitate its operations eventually hindered its ability to make far-reaching levels of integration and promote intra-regional trade. This was exacerbated in the early 90's as the apartheid regime in South Africa seemed to be coming to an inevitable end. The donors of SADCC had mainly seen their financial support of the organization as a way of countering the apartheid government. Consequently the justification for having the SADCC began to 'unravel'<sup>41</sup>.

## 2.4 The Establishment of SADC

Despite the end of the SADCC seemingly approaching, SADCC remained fortified in their drive towards regional integration. The Preferential Free Trade Area (PTA) between eastern and southern African states signed in 1983 which SADCC would be part of helped member states remain resolved in pursuing regional integration as a vehicle for economic development. This was a response to the aims and objectives of the Abuja Treaty which sought to create a common market covering Africa as a whole<sup>42</sup> using the regional economic communities as the building blocks for this end goal. It was apparent that in order to achieve this, the non-binding agreement covering SADCC would have to transform to a more solid, legally binding agreement<sup>43</sup>. As such in 1992 SADCC was not disbanded but was reborn as the Southern African Development Community (SADC). The

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<sup>39</sup> ARB, September 1987, p.14

<sup>40</sup> Brid Bowen, *The Southern African Development Conference, Trocaire Development Review*, Dublin (1990), p 41

<sup>41</sup> Siobhan Clearly, *Regional Integration and the Southern African Development Community* at pg 3

<sup>42</sup> Siobhan Clearly, *Regional Integration and the Southern African Development Community* at pg 3

<sup>43</sup> Article 3 of the Treaty of the Southern African Development Community establishes the binding nature of the treaty and defines the legal status of the organization

heads of state or government of southern Africa signed the treaty at Windhoek, Namibia, in August 1992.

The organisation continued to grow with Namibia joining in 1990, South Africa in 1994, Mauritius in 1995, Seychelles and Democratic Republic of Congo (DRC) in 1997. As it currently stands SADC has a total of 15 member states. With the addition of the new member states, the SADC treaty was amended with the signing and adoption of the Agreement Amending the Treaty of The Southern African Development Community in March 2001. Central to the new organization's goals is to further socio-economic cooperation and integration as well as political and security cooperation among the 15 southern African states. From the outset, trade liberalization became pivotal as members became aware of regional imbalances among member states. This was reflected in the wording of the treaty which outlines that SADC aims to achieve development and economic growth through regional integration<sup>44</sup>.

As part of this endeavor, the treaty articulates that central to the organisation's objective is the promotion of economic growth through intra-regional trade to support the socially disadvantaged and enhance the standard of life of the people of southern Africa. It is the goal of SADC to eradicate poverty through facilitating free trade within the region<sup>45</sup>. In order to ensure this, SADC envisaged the elimination of trade barriers, specifically reducing intra-regional imports by up to 85%. Furthermore, support is given to member states to strengthen their capacity to negotiate and implement trade agreements<sup>46</sup>. It is clear that the promotion of intra-regional trade is fundamental to SADC.

SADC deliberately avoided the creation of supranational institutions and took a ground breaking approach to regional integration compared to other African attempts, following the institutional structure of the SADCC<sup>47</sup>. The main bodies responsible for implementing SADC's regional economic integration agenda consist of the Summit,

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<sup>44</sup> Article 5(1)(a) of the SADC Treaty (1992)

<sup>45</sup> Article 5(1)(a) of the SADC Treaty (1992)

<sup>46</sup> See <http://www.sadc.int/themes/economic-development/trade/trade-liberalisation/> accessed on October 01 2014

<sup>47</sup> Jakobeit, Hartzenberg and Charalambides 2005 [www.acp-eu-trade.org](http://www.acp-eu-trade.org) 12 accessed on 17<sup>th</sup> July 2014

which is made up of Heads of State and Government; the Troika<sup>48</sup>; the Council of Ministers; the Integrated Committee of Ministers; the Tribunal; SADC National Committees; Standing Committee of Officials; and the Secretariat. The tribunal represented the only new institution introduced by the Windhoek Treaty. The Summit (as with SADCC previously) is made up of heads of state and government and is the ‘supreme policy making institution<sup>49</sup>’ of SADC.

The Summit makes binding decisions on policy matters and it has the power to appoint the Executive Secretary and Deputy Secretary of the Secretariat and admits new members into SADC<sup>50</sup>. The troika consists of the Chair, the incoming Chair and the outgoing Chair of the SADC, which has been effective since it was established in Maputo, Mozambique in 1999<sup>51</sup> by the Summit. The Troika also applies with respect not only to the Summit but also to the Organ, the Council, the integrated Committee of Ministers and the standing Committee of Officials<sup>52</sup>. It meets more often than the Summit and its decisions and work are closely linked to the Summit thus strategically it plays an essential role in the implementation of the regional integration agenda<sup>53</sup>.

On the other hand, the Council consists of ministers from member states usually from the ministries of Foreign Affairs, Economic Planning, or Finance. It plays a central role as an advisory body to the Summit on matters of overall policy, and the efficient and harmonious functioning and development of SADC<sup>54</sup>. This is an important function for the Council since the Summit normally meets once or twice a year. It is essential in keeping the most important organ of the SADC well informed of the developments around regional integration. However, the Council remains under the authority of the Summit and must report directly to it.

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<sup>48</sup> Introduced through the Amended SADC Treaty in 2001

<sup>49</sup> Article 10(1) SADC Treaty (1992)

<sup>50</sup> Article 10(7) SADC Treaty (1992), Article 8(2) SADC Treaty (1992)

<sup>51</sup> SADC Date Unknown see [www.africa-union.org](http://www.africa-union.org) accessed on 21<sup>st</sup> July 2014

<sup>52</sup> Article 9(1) SADC Treaty (2001)

<sup>53</sup> A Saurombe, *The Role of SADC Institution's in Implementing SADC Treaty Provisions dealing with Regional Integration*, P.E.R Vol. 2 2012 pg. 12

<sup>54</sup> A Saurombe, *The Role of SADC Institution's in Implementing SADC Treaty Provisions dealing with Regional Integration*, P.E.R Vol. 2 2012 pg. 12

The Integrated Committee of Ministers is made up of at least two ministers from each member state and it meets at least twice a year. The Integrated Committee of Ministers oversees the activities of the four core areas of integration, notably Trade, Industry, Finance and Investment<sup>55</sup>; Infrastructure and Services<sup>56</sup>; Food, Agriculture and Natural Resources<sup>57</sup>; and Social and Human Development and Special Programs<sup>58</sup>, including the implementation of the Strategic Plan in their areas of competence.

The committee is responsible to the Council on all matters and also provides policy guidance to the secretariat and makes decisions on matters pertaining to the Directorates, as well as monitoring and evaluating their work. It also has decision-making powers to ensure the rapid implementation of the programs that would otherwise wait for a formal meeting of the Council<sup>59</sup>. Another body which stands as an advisory to the Council is the Standing Committee of Officials. This technical advisory committee to the Council is made up of one permanent secretary from the ministry of the Member State which serves as the SADC national contact point. They meet at least four times a year with their decisions being made by consensus, with their main function to process documentation from the Integrated Committee of Ministers and report to the Council. Meanwhile, the Secretariat is the principal executive institution of the SADC responsible for the strategic planning, coordination and management of SADC programs<sup>60</sup>. It is headed by an Executive Secretary and has its headquarters in Gaborone, Botswana<sup>61</sup>.

The Secretariat is the driving force behind the strategic planning and management of SADC programs and is in charge of implementing the decisions of the Summit and Council. It is also in charge of organizing and coordinating SADC meetings at all levels<sup>62</sup>.

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<sup>55</sup> Article 12.2.1 SADC Treaty (1992).

<sup>56</sup> Article 12.2.2 SADC Treaty (1992).

<sup>57</sup> Article 12.1.3 SADC Treaty (1992).

<sup>58</sup> Article 12.1.4 SADC Treaty (1992).

<sup>59</sup> A Saurombe, *The Role of SADC Institution's in Implementing SADC Treaty Provisions dealing with Regional Integration*, P.E.R Vol. 2 2012 pg. 15

<sup>60</sup> Article 14.1.1 SADC Treaty (1992)

<sup>61</sup> Article 2.2 SADC Treaty (1992)

<sup>62</sup> Article 14.1.3 SADC Treaty (1992)

The Secretariat further plays a key role in mobilizing financial support from both the private and public sector stakeholders for the purpose of funding regional integration programs such as transport corridors. Moreover, the representation and promotion of SADC is also a key responsibility of the Secretariat, as the institution requires key representation at regional and multilateral levels. The Secretariat also represents SADC outside the African continent. However, the biggest challenge for the Secretariat is the apparent unwillingness of member states to surrender national initiative and active representativeness to the principle of supra-nationalism<sup>63</sup>. Again this is a reflection of African heads of state safeguarding their own sovereignty which was hard won from colonial administrators. It is clear that sovereignty poses a great challenge to regional integration in Africa in this regard.

These challenges were severely highlighted with the case of the SADC tribunal. The tribunal was established following Article 9 of the 1992 SADC treaty. It became operational in 2005 and was based in Windhoek, Namibia. The body was instituted to provide legal guidance on all SADC related issues and signaled an integral part of the regional integration agenda for SADC. The Tribunal was mandated to give “advisory opinions on such matters as the Summit or the Council may refer to it<sup>64</sup>”. It had jurisdiction over all disputes and application in relation to the provisions of the SADC treaty and protocol provisions<sup>65</sup>. According to the protocol of the tribunal, it was to consist of not less than ten Members, appointed from nationals of States who possess the qualifications required for appointment to the highest judicial offices in their respective States or who are jurists of recognised competence<sup>66</sup>.

However, the tribunal faced its biggest challenge early on in the case of *Gramara (Pty) Ltd and one other v The Government of the Republic of Zimbabwe and two others*<sup>67</sup>.

The Zimbabwean courts refused to enforce a decision of the tribunal arguing that the

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<sup>63</sup> A Saurombe, *The Role of SADC Institution's in Implementing SADC Treaty Provisions dealing with Regional Integration*, P.E.R Vol. 2 2012 pg. 20

<sup>64</sup> Art. 16 (4) SADC Treaty 1992

<sup>65</sup> Protocol on The Tribunal And Rules of Procedure Thereof

<sup>66</sup> Article 3 (1) Protocol on The Tribunal And Rules of Procedure Thereof

<sup>67</sup> *Gramara (Pty) Ltd and one other v The Government of the Republic of Zimbabwe and two others* (HC 33/09) [2010] ZWHHC1

decision was contrary to the public policy policies of Zimbabwe. The Tribunal had found that the government of Zimbabwe may not evict farmer Mike Campbell from his land, and that farm evictions per Amendment 17 of Zimbabwe's constitution amounted to de facto discrimination of Whites. The Zimbabwean Government rejected this ruling, challenging its legality and lobbied the Summit to suspend the Tribunal. The tribunal was disbanded following a decision of the Summit in 2010 in Windhoek<sup>68</sup> pending an independent six-month review of its role, functions and terms of reference. However, a new protocol was adopted by the Summit to reconstitute the tribunal albeit with reduced functions<sup>69</sup>.

On the whole, the decision of the Summit in this regard is detrimental to the regional integration agenda. Trade and other policies are not enough on their own to have a far-reaching effect on integration and ultimately development in the SADC region. The rule of law is also an important basis for regional integration<sup>70</sup>. While on the outset it is clear that SADC has strong and solid institutional foundations for the implementation of the regional integration agenda, certain provisions need to address the apparent gaps in the regional integration efforts. Such gaps are not only limited to the SADC tribunal and its challenges but in other areas of the SADC set up as a whole, specifically the SADC trade protocol.

## 2.5 **Conclusion**

It follows from the foregoing that the southern African region shares a long and integrated history of trade and integration. Intra-regional trade rose to prominence prior to the colonial era where communities in southern Africa traded in ivory and gold among other goods. The significance of trade further increased with the dawn of colonialism when trade was recognised as an essential tool to promote the economic prospects the small and fragmented economies. It was realized that to promote intra-regional trade, the countries of

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<sup>68</sup> SADC 2011 [www.swradioafrica.com](http://www.swradioafrica.com). See also Van der Bosch 2011 [www.globalissues.org](http://www.globalissues.org) accessed on 25<sup>th</sup> July 2014

<sup>69</sup> See <http://www.bdlive.co.za/africa/africannews/2014/08/20/sadc-tribunal-back-with-mandate-reduced-to-interstate-cases> accessed on October 1 2014

<sup>70</sup> Werner Sholtz and Gerrit Ferreira, *Much Ado About Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration*, ZaöRV 71 (2011), 331-358

the region had to integrate economically. This led to the creation of regional blocs within the region. The larger markets established by the blocs were seen as a way of promoting free trade and ultimately a way of enhancing the economic growth.

With the dawn of the apartheid regime in South Africa, trade became fundamental for more than merely economic reasons. The diverging ideologies of the governments at the time meant that trade became a leveraging tool for different governments to safe guard and advance their interests. It was for this reason that intra-regional trade gained further prominence as it became intertwined with the political and social future of the FS states.

A great deal depended on the success of these states in promoting intra-regional trade between themselves and becoming economically independent on South Africa. Ultimately (with the demise of the apartheid regime) the intra-regional trade remained relevant and central to the southern African region. In order to promote equitable and sustainable economic growth and ultimately reduce poverty levels in the region, the promotion of intra-regional trade was to take a central role. As such every effort must be made to ensure the elimination of trade barriers in order to achieve this goal.

## CHAPTER THREE

### The SADC Trade Protocol: An Analysis

#### 3.1 **Introduction**

The following chapter will seek to illustrate the aims and objectives of the SADC trade protocol in relation to the promotion of intra-regional trade. A critical analysis of the protocol and certain provisions will follow which will endeavor to outline its impact in promoting trade within the region. Particular emphasis will also be placed upon the areas in which the protocol falls short. It will be argued that although the protocol lays a solid foundation for the promotion of trade in the region, there are provisions within the instrument which pose a threat to the expansion of intra-regional trade.

#### 3.2 **Introduction to the SADC Protocol on Trade and its objectives**

Intra-regional trade in southern Africa has been on a steady increase since the inception of the regional bodies of SADCC and subsequently SADC. It is estimated that in 1996 intra-SADC trade was valued at US\$ 9 million, an increase of US\$ 2.9 million from the previous year.<sup>71</sup> However, intra-SADC trade still remained significantly low compared to other regions of the world. For example, intra-regional trade in the European Union (EU) stood at 66 per cent in 2000 and in the North American Free Trade Area (NAFTA) it stood at 56 per cent. This is in comparison to intra-regional trade in SADC which stood at 11 per cent.<sup>72</sup> Despite this, intra-SADC trade has continued to grow and was valued at about US\$ 558 million<sup>73</sup> in 2011.

Consequently, in an effort to facilitate the growth of intra-regional trade and integration, SADC adopted the Protocol on Trade in the Southern African Development

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<sup>71</sup>Development Policy Research Unit, University of Cape Town, *Trade Patterns in the SADC Region: Key Issues for the FTA* brief no 00/P9, (2001), at pg. 6

<sup>72</sup>Southern African Development Research Network, *Implementation of the SADC Protocol and Intra-SADC trade performance* (2008), at pg. 9

<sup>73</sup> See [www.sadc.int/issues/statistics](http://www.sadc.int/issues/statistics) accessed on January 10th 2015



Community (the Trade Protocol) in Maseru, Lesotho in 1996 and entered into force in 2001<sup>74</sup>. The protocol on trade was originally only ratified by Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Madagascar acceded to the protocol in 2006 and submitted a tariff offer that was accepted and ready for commencement implementation. Angola, the Democratic Republic of Congo and Seychelles remain outside this agreement.

The main objectives of the protocol are to ‘further liberalize intra-regional trade in goods and services; to ensure efficient production within SADC reflecting the current and dynamic comparative advantages of its members; to contribute towards the improvement of the climate for domestic, cross-border and foreign investment; to enhance the economic development, diversification and industrialization of the region; and to ultimately establish a Free Trade Area (FTA) in the SADC Region.’<sup>75</sup>

The goal was to have 85% of all intra-SADC trade at zero tariffs by 2008 and the remaining 15% to be liberalized by 2012.<sup>76</sup> In achieving these objectives, the Protocol aims to eliminate tariff barriers to intra-SADC trade specifically import and export duties and eliminate non-tariff barriers such as quantitative restrictions on exports and imports. The tariff phase down commenced on September 1, 2001 and was scheduled to result in a World Trade Organisation (WTO) compliant FTA by January 1, 2008.<sup>77</sup> The reduction of tariffs was to be carried out on the basis of four categories. Category A required the immediate reduction of duty to zero per cent at the beginning of the implementation period, by 2000.<sup>78</sup> These included goods that already had low or zero tariffs. The second category B dealt with goods that constitute significant sources of customs revenue and whose tariffs were to be removed over 8 years, by 2008.<sup>79</sup> This was recognition by SADC that the quick and sudden removal of tariffs could have a devastating impact on the

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<sup>74</sup> This can be obtained from the SADC website <http://www.sadc.int/about-sadc/interation-milestones/free-trade-area> accessed on 5th January 2015

<sup>75</sup> Southern African Development Community (SADC) Protocol on Trade, Article 2 (1996)

<sup>76</sup> Paul Kalenga, *The Implementation of the SADC Trade Protocol: Some Reflections*(2000) at Para. 2

<sup>77</sup> FTA's must comply with the WTO governing rules which require parties to a regional trade agreement to establish free trade on substantially all trade within the regional area and that the parties cannot raise their tariffs or other barriers against countries outside the agreement.

<sup>78</sup> Paul Kalenga, *The Implementation of the SADC Trade Protocol: Some Reflections*(2000) at Para. 2

<sup>79</sup> Paul Kalenga, *The Implementation of the SADC Trade Protocol: Some Reflections*(2000) at Para. 2

economies of some countries which would ultimately undermine the promotion of intra-regional trade and ultimately undermine regional integration efforts.

Moreover, categories A and B goods should account for 85% of intra-SADC trade so that by 2008 SADC could be regarded as a free trade area in compliance with Article 24 of the General Agreement on Tariffs and Trade (GATT). Category C deals with sensitive products such as sugar (imports sensitive to domestic industrial and agricultural activities) whose tariffs were to be eliminated between 2008 and 2012. Category C is limited to a maximum of 15% of each Member's intra-SADC merchandise trade. On the other hand, category E is goods that can be exempted from preferential treatment under Articles 9 and 10 of the Trade Protocol such as firearms and munitions, comprising of a small fraction of intra-SADC trade.

A member state assents to the protocol through submitting an instrument of implementation, which is in fact a tariff phase down schedule over the implementation period.<sup>80</sup> These offers are country specific and are based on the principle of reciprocity. This means that any preferences with regards to tariffs will only be extended to member states that have also submitted their instruments of implementation. The tariff liberalization process under the protocol is based on an offer approach founded on the idea of asymmetry, which takes into account the level of development of member states. This principle ensures that the least-developed member states are allowed a slower phase down period. It may be viewed as a means of enhancing equity in the region owing largely to the disparity between the larger economy of South Africa and the smaller economies of other SADC member states. Thus each member state submitted two offers – one schedule for South Africa and a 'differentiated offer' to the rest of SADC (excluding South Africa). This allows for a faster tariff phase down schedule.<sup>81</sup>

Members of the Southern African Customs Union (SACU) made a single offer to the other SADC members by virtue of having a common external tariff (CET). This collective offer to the other SADC members, provided for the immediate reduction on duties to achieve zero tariffs after five years. This however did not include sensitive

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<sup>80</sup> These can be obtained from the SADC website: [www.sadc.int](http://www.sadc.int), accessed on 5<sup>th</sup> August 2014

<sup>81</sup> Paul Roos, *Trade Bried SADC Trade Protocol*, (2001) at pg. 2

products. Zimbabwe and Mauritius (as developing economies compared to the rest of the region) also agreed to start their tariff reductions earlier than other non-SACU members.<sup>82</sup>

### 3.3 **The main provisions of the Protocol**

The protocol sets out that the modalities for implementing the elimination of trade barriers shall be overseen by the committee of ministers responsible for trade matters.<sup>83</sup> As previously stated, it outlines a period of 8 years from the entry into force of the protocol as the time frame in which to achieve these objectives.<sup>84</sup> The Protocol first placed a cap on the amount of import duties with the requirement that member states shall not raise import duties beyond those in existence at the time of entry into force of this Protocol and further set the reduction of import duties to be gradually reduced in phases within the 8 year period.<sup>85</sup> It was to be accompanied by an industrialization strategy to improve the competitiveness of member states. Here SADC established a strong foundation on which to expand and grow intra-regional trade. Not only would the industrialization strategy ensure that SADC member states become competitive in trade in goods it would also encourage intra-regional trade.

The Protocol also outlined quantitative import restrictions addressing non-tariff barriers. Member states are obliged not to apply any new quantitative restrictions and shall in accordance with Article 3; phase out the existing restrictions on the import of goods originating in member states.<sup>86</sup> Similar provisions also apply in relation to quantitative restrictions on exports.<sup>87</sup> The protocol further places an obligation on member states not to apply any export duties on goods for export to other member states. However, this does not prevent member states from applying duties to third countries outside the community.<sup>88</sup>

The provisions stipulated in article 3 are also of particular interest. The provision states that: The process and modalities for the phased elimination of tariffs and non-tariff

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<sup>82</sup> Paul Roos, *Trade Bried SADC Trade Protocol*, (2001) at pg. 2

<sup>83</sup> Article 3, Protocol on Trade Article (1996)

<sup>84</sup> Protocol on Trade Article 3 (1996)

<sup>85</sup> Protocol on Trade Article 4 (1996)

<sup>86</sup> Protocol on Trade Article 7 (1996)

<sup>87</sup> Protocol on Trade Article 8 (1996)

<sup>88</sup> Protocol on Trade Article 5 (1996)

barriers shall be determined by the Committee of Ministers responsible for trade matters (CMT) having due regard to the following: that the elimination of barriers to trade shall be achieved within a time frame of eight years from entry into force of this Protocol. That different tariff lines may be applied within the agreed time frame for different products, in the process of eliminating tariffs and NTBs and the process and the method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special consideration, shall be negotiated in the context of the Trade Negotiating Forum (TNF) among others<sup>89</sup>.

This is central for the promotion of intra-SADC trade, in which substantially all trade must be liberalized. At the time the protocol entered into force, member states were apparently not ready to commit to the effect of the legal position stipulated by its provisions.<sup>90</sup> The binding obligations outlined were unclear. The CMT was subsequently tasked to elaborate appropriate and clear obligations enunciated by Article 3.<sup>91</sup> Moreover, the process and the method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special consideration had to be negotiated in the TNF. Once adopted, the process and modalities for eliminating intra-SADC trade barriers would form an integral part of the protocol and consequently of the SADC legal system.<sup>92</sup>

The process and modalities for eliminating intra-SADC trade barriers have yet to be fully enunciated by the TNF leaving a lacuna in the implementation of the protocol. This illuminates an underlying uncertainty which is yet to be clarified. Further, since the inception of the SADC free trade area in 2008 several derogations were granted under Article 3(c). The legal principles in terms of which this has happened and the procedure for

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<sup>89</sup> Protocol on Trade Article 3 (1996)

<sup>90</sup> Gerald Erasmus, *Why Article 3 of the SADC Protocol on Trade needs to be fixed*, (2013) see <http://www.tralac.org/discussions/article/5323-why-article-3-of-the-sadc-trade-protocol-needs-to-be-fixed.html> accessed on October 16<sup>th</sup> 2014

<sup>91</sup> Gerald Erasmus, *Why Article 3 of the SADC Protocol on Trade needs to be fixed*, (2013) see <http://www.tralac.org/discussions/article/5323-why-article-3-of-the-sadc-trade-protocol-needs-to-be-fixed.html> accessed on October 16<sup>th</sup> 2014

<sup>92</sup> see <http://www.tralac.org/discussions/article/5323-why-article-3-of-the-sadc-trade-protocol-needs-to-be-fixed.html> accessed on October 16<sup>th</sup> 2014

monitoring compliance are not known.<sup>93</sup> This state of affairs undermines legal certainty and is ultimately perilous to intra-regional trade. It also results in the imperfect functioning of the free trade area, particularly where exceptions to the tariff and related trade rules should be based on solidly outlined provisions.

### **3.4 Exemptions from the provisions of the Protocol**

The foregoing provisions of the trade protocol are further accompanied by specific exceptions. The protocol allows member states to enact contrary policies provided they are ‘necessary to protect public morals or to maintain public order; protect human, animal or plant life or health; protect intellectual property rights, or to prevent deceptive trade practices; relating to the conservation of exhaustible natural resources and the environment; or necessary to ensure compliance with existing obligations under international agreements<sup>94</sup>, among other exemptions.

These broad derogations are qualified with the provision that such measures are acceptable so long as they are not applied in a manner which does not constitute a means of arbitrary or unjustifiable discrimination between member states, or amount to a disguised restriction on intra-SADC trade<sup>95</sup>. Although the qualification *prima facie* appears to protect the abuse of this provision, its practical effect impedes the promotion of intra-regional trade. This was highlighted in the case of Tanzania and Zimbabwe who initiated these derogation provisions in the paper industry of the former and goods industries of the latter.

At the February 2011 CMT meetings, Tanzania and Zimbabwe submitted requests for derogation from SADC tariff phase down obligations.<sup>96</sup> Both requests were made by reference to Article 3 of the protocol on trade. Tanzania made the request for derogation for

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<sup>93</sup>Gerald Erasmus, *Why Article 3 of the SADC Protocol on Trade needs to be fixed*, (2013) see <http://www.tralac.org/discussions/article/5323-why-article-3-of-the-sadc-trade-protocol-needs-to-be-fixed.html> accessed on October 16<sup>th</sup> 2014

<sup>94</sup>Protocol on Trade Article 9 (1996)

<sup>95</sup> Protocol on Trade Article 9 (1996)

<sup>96</sup>AECOM International Development, *Audit of the Implementation of the SADC Protocol on Trade* (2011), at para. 3.3 pg. 19

its paper industry to support it in achieving required economies of scale and to successfully compete in international markets. The request for derogation was for three years during which time Tanzania will apply a 25% tariff for industrial packaging grades. Trade data indicated that the sole SADC exporter of these products to Tanzania is South Africa, and thus any negative economic effects of the derogation are likely to be confined to that country.<sup>97</sup> However, the negligible economic effects between Tanzanian and South African trade can have an overall effect on the amount of intra-regional trade within SADC.

On the other hand, Zimbabwe had requested and was granted a two-year delay in their tariff liberalisation schedule for goods in Category C i.e. sensitive products. The protocol had originally envisaged complete liberalisation in these products by 2012. Zimbabwe's grace period consequently delayed this full liberalisation goal to 2014. Not only did this delay the implementation of the protocols goals and objectives, this has meant that SADC's exports of goods in category C to Zimbabwe (excluding South Africa) comprised only 3.3% of the total of SADC exports in these categories. 62% of the goods (comprising 3.3% of the total of SADC exports to Zimbabwe) originate from South Africa.<sup>98</sup>

Although it may prima facie appear justified that Zimbabwe invoked this article to protect its own growing industry, the provision to delay the liberalisation schedule for the goods is far-reaching. It serves to consolidate the current status quo in relation to the trade balance within SADC and does nothing to encourage trade in the region. Perhaps a more comprehensive and less extreme compromise in balancing the interests of Zimbabwe's industries and intra-SADC trade would have been to implement a gradual less swift reduction of tariffs. The Protocol should have included an express provision outlining this. Only in exceptional circumstances (where the gradual reduction would still be severely detrimental to a particular industry) could the delay be invoked. The CMT would be charged to determine this.

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<sup>97</sup>AECOM International Development, *Audit of the Implementation of the SADC Protocol on Trade* (2011), at para. 3.3.1 pg. 21

<sup>98</sup>AECOM International Development, *Audit of the Implementation of the SADC Protocol on Trade* (2011), at para. 3.3.2 pg. 21

The protocol further enables member states to invoke a security exemption on any contrary measures for the purposes of maintaining peace.<sup>99</sup> Although this may appear justifiable, in practice this provision has to some extent hindered the goals of regional integration and ultimately the objectives outlined in article 2 of the protocol. The provision fails to define what exactly measures for the purposes of maintaining peace could be. As such, SADC countries may utilize this lacuna to widen the breadth of this provision to include certain protectionist measures which are inherently restrictive of the goals and objectives of the protocol.

In light of this, member states are allowed to exclude certain goods and sectors from the general trade liberalization provisions of the Protocol. Each SADC member state has excluded certain goods from its tariff reduction offers and in practice it would appear that goods have been excluded for reasons other than those permitted by the protocol.<sup>100</sup> In particular much exclusion seems to originate from an attempt to fulfill domestic interests which are opposed to have their sectors subject to international competition, or else because of alleged revenue needs of member country governments fearing loss of tariff revenues due to trade liberalization. Certain lobby groups in member states with strong commercial interests may concentrate their efforts in pressuring their government to place certain goods within the excluded category. Such groups are driven to safeguard their own interests in a particular market and such interests may be contradictory to the interests of the protocol and SADC as a whole.

The cases of sugar and wheat flour illustrate the resistance to trade liberalization and as such are clear ‘violations of the spirit, if not the letter of the Protocol.’<sup>101</sup> The major sugar and wheat flour producing countries have negotiated quota-limited access to the South African market. Such quotas are innately a threat to the promotion of intra-regional trade and the trade protocol must be amended to address this problem. If intra-SADC trade is to be boosted, any unnecessary limitation on trade must be eliminated. SADC has a total

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<sup>99</sup>Protocol on Trade Article 10 (1996)

<sup>100</sup>Frank Flatters, *The SADC Trade Protocol: Impacts, Issues and the Way Ahead* (2001) at pg. 4

<sup>101</sup>Frank Flatters, *The SADC Trade Protocol: Impacts, Issues and the Way Ahead* (2001) at pg. 4

of 8 sugar producing states namely: South Africa, Tanzania, Swaziland, Zambia, Malawi, Mauritius, Zimbabwe and Mozambique.<sup>102</sup> The sugar industries in these countries are dictated by political and local considerations. Sugar is a large driver of the economies of these SADC countries as they generate large amounts of foreign exchange, contributing to the gross domestic products and government revenue. As such distortions exist in the form of tariff and non-tariff barriers to trade in this product.<sup>103</sup> This is a problem inherent with the Protocol: It fails to provide a systematic calculation of which products and industries truly deserve to be excluded from its provisions. The sugar industries in some of these countries are well developed with some contributing significantly to member states gross domestic product<sup>104</sup>. As such, they should be mature enough to with stand competition within the region allowing the creation of economies of scale which would subsequently boost intra-regional trade.

Other SADC countries went even further as Tanzania notified the CMT in February 2011 that it had re-imposed tariffs on sugar products.<sup>105</sup> It requested an ex post derogation for these tariff increases. Sugar tariffs for Tanzania had previously been phased down under Tanzania's obligations under the SADC protocol on trade. However, in recent years, sugar imports have increased substantially from US\$ 41.5 million in 2008 to US\$ 92.4 million in 2010. Sugar imports from SADC Member States more than quadrupled during this time from US\$ 4.2 million in 2008 to US\$ 17 million in 2010.<sup>106</sup> It is clear that intra-regional trade in sugar during this period experienced rapid growth due to the successes achieved by the trade Protocol in reducing tariff barriers to trade. The sugar industry in

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<sup>102</sup> This can be obtained from <http://www.mbendi.com/indy/agff/sugr/af/p0005.htm> accessed on 6th August 2014

<sup>103</sup> Michael Matsebula, *Key Issues Facing the Sugar Industries in the Southern African Development Community*, DPRU Working Papers, at pg. 1

<sup>104</sup> As is the case in Malawi. The sugar industry is one of the main earners of foreign exchange to the economy. See <http://www.illovosugar.co.za/UserContent/Documents/Illovo-Malawi-Socio-economic-Impact-Assessment-12May14.pdf> accessed on January 6th 2015

<sup>105</sup> AECOM International Development, *Audit of the Implementation of the SADC Protocol on Trade* (2011), at para. 3.3.1 pg. 19

<sup>106</sup> AECOM International Development, *Audit of the Implementation of the SADC Protocol on Trade* (2011), at para. 3.3.1 pg. 20



Tanzania is a substantial employer with estimates that the sugar factories and the farms create jobs for approximately 65,000 people.<sup>107</sup>

Consequently, for the countries within the SADC region which also produce and export sugar such as Malawi, Mozambique, South Africa and Zambia, this has meant that trade with Tanzania was adversely affected. It effectively means that sugar products from other SADC countries are not able to favorably compete on the Tanzanian market due to the high tariff imposed on them contrary to the spirit and goals of the trade protocol. It is clear that although the derogations may appear to have helped Tanzania make its sugar industry stronger and competitive, the provision does little to improve intra-regional trade within SADC. This ultimately undermines the objectives of the protocol and SADC as a whole.

While the protocol recognizes this and addresses this through placing it as part of the “sensitive products” category, it fails to go far enough in addressing the long term effects of these provisions on overall intra-regional trade. The legal principles which guide and monitor compliance in terms of which such derogations are made and the procedures for monitoring compliance with the exceptions provided by the protocol are not outlined in the Protocol. This leaves the provisions of the protocol open to abuse by member states and ultimately undermines the objectives of the protocol. The idea of liberalised global trade is based on the interaction between higher global income and comparative advantage. As such the sugar industries in SADC will ultimately also have to succumb to liberalized trade.<sup>108</sup> The derogation provisions are innately flawed as they fail to outline monitoring provisions and guidelines for derogating and this consequently lead to flaws in the way member states use these provisions.

While it can be argued that trade liberalization and facilitation within the SADC region is central to generating industrial and general economic growth to secure sustainable

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<sup>107</sup>AECOM International Development, *Audit of the Implementation of the SADC Protocol on Trade* (2011), at para. 3.3.1 pg. 19

<sup>108</sup>Michael Matsebula, *Key Issues Facing the Sugar Industries in the Southern African Development Community*, DPRU Working Papers, at pg. 5

and equitable development of the region, it could be also be argued that the continued use of special protection measures for small industries is necessary to secure a country's development objective. This is poignantly reflected by the protocol itself which allows member states to safeguard minor industries as outlined in Article 21 of the Protocol.<sup>109</sup> On the one hand, there appears to be no conflict between trade liberalization and the goals of industrial policy. The protectionist measure would spur the growth of the infant industry leading to the economic growth of the country in question and ultimately the region as a whole. On the other hand, there seems to be a fundamental conflict between the goals of trade liberalization and protecting and promoting the growth of minor industries.

Protectionist measures are innately a barrier to intra-regional trade and thus contrary to the trade liberalization. This paradox alludes to one of the many lacunas of this instrument. It is imperative that such contentions be addressed. It would be in the interest of regional integration and the objectives of the protocol to stipulate which provisions are to take precedence in order to deal with these conflicts. In this regard, the provision of relating to trade liberalization should have priority rather than the safeguarding of infant industries as the former is central to the goals of the protocol. The determination of this could be done by the CMT with some guidance given in the protocol outlining economic output of the industries as a starting point in determining whether an industry is still in its infancy. The temporary protection measures as they stand do not outline a specific timeline for the measure nor provide any guidance as to what industry qualifies for such a measure. The Protocol could stipulate that it is the CMT's responsibility to weigh specific economic factors with the overall consideration being the promotion of intra-regional trade within SADC in line with the Protocol objectives.

Moreover, it would appear that some countries in the region use article 21 as an escape clause for their binding obligations under the protocol to liberalize trade; countries use this clause to protect industry that are arguably large contributors to their economy. It would be prudent for the protocol to include a definition of what constitutes an 'infant

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<sup>109</sup>Protocol on Trade Article 21 (1996)

industry’ to curtail the abuse of this provision which only serves to undermine trade liberalization and ultimately regional integration efforts.

### **3.5 National Treatment and Most Favored Nation Principle**

Like most regional integration instruments, the protocol introduces the concept of national treatment (NT) to SADC produced goods and products. This is the idea that all member states must provide the same treatment regarding regulations and requirements to SADC goods and products as the treatment rendered to goods produced nationally or locally.<sup>110</sup> It follows that goods traded within SADC are to be accorded the same treatment as goods produced nationally in respect of ‘laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.’

This is complimented by a similar provision encapsulating the most favored nation (MFN) principle outlined in Article 28 of the protocol. This stipulates that member states must grant any preferential treatment given to a third party state (non-SADC) to other SADC states.<sup>111</sup> Consequently, member states are permitted to grant or maintain preferential trade arrangements with third countries, provided that such arrangements do not impede the objectives of the protocol. Further, any ‘advantage, concession, privilege or power’ given to a third country under such arrangements must also be given to SADC member states. Essentially, if for example a country like Tanzania is part of the East African Community (EAC) upon its induction into the SADC group it must ensure that any favorable treatment or advantage given to the EAC must also be given to the SADC member states.

While this is necessary, the trade protocol fails to protect against threats to intra-SADC trade and integration by stopping short of stopping the reciprocity of this provision in regards to similar instruments in other REC’s. The Protocol should have made it clear in its provisions that multiplicity of membership would not be allowed thus eliminating the need for a reciprocity provision. In the Tanzanian example, in its obligations under the

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<sup>110</sup>Protocol on Trade Article 11 (1996)

<sup>111</sup>Protocol on Trade Article 28 (1996)

Protocol on the Establishment of the East African Customs Union (the EAC protocol), Tanzania is obliged to provide national treatment and non-discrimination to EAC products.<sup>112</sup> In light of this, Tanzania would have to provide the same concessions it provides to the EAC to the SADC as well. Essentially this would undermine the goals and aims on the SADC trade protocol in creating an internal market and ultimately a customs union. If SADC is to create a customs union and a common market it would be efficient and complimentary for the Protocol to only engage third party countries as a single bloc rather than permitting individual countries to enter into individual preferential trade agreements. Although the Protocol stipulates that the benefits of these agreements must also be afforded to other member states, it inherently undermines the mechanics of a customs union.

The aims and objectives of the trade protocol to ultimately improve intra-SADC trade are further undermined when read in light of the MFN exceptions encompassed within the protocol. The SADC protocol goes on to provide that member states are not obliged to extend preferences of another REC of which they were a member at the time of the Protocol's entry into force<sup>113</sup>. Fundamentally this provision allows SADC member states to maintain preferential agreements with third party states which are more beneficial to it than any SADC concession. [It is clear to see that the SADC trade protocol delayed addressing common external tariff policies of member states which might undermine integration in the region. Currently, a common external tariff is expected to be concluded in 2015 much later than originally anticipated by the protocol.<sup>114</sup> Although this may have been delayed to cater for the interests of the SACU members within SADC<sup>115</sup>, this is severely detrimental to the protocol's objective of establishing a free trade area in the region.

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<sup>112</sup>EAC Customs Union protocol, Article 15, (1999)

<sup>113</sup>SADC Protocol on Trade, Article 28(3), (1996)

<sup>114</sup> See <http://www.theeastafrian.co.ke/news/comesa-sadc-imports-get-tariff-relief-again>

<sup>115</sup>Henry Kibet Mutai, *Regional trade integration strategies under SADC and the EAC: A comparative analysis*, SADC Law Journal (2011) Vol 1

### 3.5.1 Non-Tariff Barriers

Non-tariff barriers to trade (NTB) are trade barriers that restrict the flow of trade but are unlike the usual form of a tariff barrier. Most of these NTBs include quantitative restrictions, customs procedures, anti-dumping measures and countervailing duties. Although they may be utilized as a means to evade liberal trade, they are permitted in some circumstances when they are deemed to be necessary to safe-guard public health and safety, sanitation or the depletion of exhaustible natural resources. The Protocol has largely failed to address and balance these concerns.

Border delays, toll fees and infrastructural problems within SADC trade routes operate to hinder substantial intra-regional trade. The Federation of East and Southern African Road Transport Associations (FESARTA) commissioned a report conducted in 2005 and 2006 which found that consolidated multiple entry (CME) trucks travelling north from South Africa to Zimbabwe took on average more than two days to clear the Beit Bridge border crossing<sup>116</sup>. The study further found that Break bulk single entry (BBSE) loads fared better, generally taking around a day to clear the crossing, while refrigerated goods and oil tankers passed through much quicker.

This is significant in terms of trade within the region as the Beit Bridge border crossing is the busiest border post not only within SADC but on the entire African continent<sup>117</sup>. Consequently, the restriction of trade here would have substantial impact on trade within the region. The Protocol on trade should have included express provisions in dealing with administrative procedures at border posts throughout the region to facilitate smooth trade. Further, the Protocol should have gone as far as creating one stop border posts within SADC. An example of the benefits of these one stop border posts can be illustrated with the Zambian Chirundu border.

The Chirundu border post between Zambia and Zimbabwe was first conceptualized in 2005 and essentially means that each nation holds onto its rights and the co-operation between the two countries is coordinated by a bilateral agreement that gives each country authority to enact its rule on the other side of the border, meaning one stop, instead of two. This would boost SADC and Africa's trade and economic growth. It has been estimated that savings in time values of border

<sup>116</sup> See <http://www.sadctrade.org/files/Chapter6-2007-Non-tariff-barriers-in-SADC.pdf> accessed on June 20th 2015

<sup>117</sup> See <http://www.iol.co.za/news/south-africa/gauteng/why-ubuntu-stops-at-beit-bridge-1.1803404#.VZaDARuqqko> accessed on June 20<sup>th</sup> 2015

delays at Chirundu are as high as \$600 000 a day<sup>118</sup>. As such, it is imperative that the Protocol crystalizes such administrative processes through an express provision establishing similar one stop border posts through-out the SADC region.

Moreover, the use of road transportation remains a significant mode of intra-regional trade within SADC. Though SADC has an extensive road network, there is a variation between members in the general condition of their respective road networks. In general, less than 20% of total roads are paved<sup>119</sup> representing another significant NTB. Each member state has been taking to rehabilitate, maintain and upgrade the conditions of the road network within their respective boundaries. For example, in Lesotho, the road network is constantly being expanded and upgraded, especially with the Lesotho Highlands Water Project<sup>120</sup>. While SADC enacted a Protocol on Transport, there are no binding commitments on member states to ensure that road networks are maintained to facilitate trade

The Protocol on Trade missed an opportunity to expound on these issues through stipulating binding obligations on member states consistent with the Transport Protocol to ensure that road networks are not a hindrance to trade. Rather than leaving it to the individual member states prerogative to decide how much to invest in road infrastructure the community through the trade protocol could have had express provisions which directly influence the economic policy of its members in a manor favorable to intra-regional trade.

### 3.5.2 **Quantitative Restrictions**

Quantitative restrictions refer to a ban on imports or exports after a determined quantity or a quota has been reached. Member states of SADC are obliged not to invoke these under their WTO commitments<sup>121</sup> and also pursuant to the SADC trade protocol.<sup>122</sup> Despite this, quantitative restrictions are prevalent in SADC not only with the sugar industry as previously outlined but also in relation to other industries. It seems the main

<sup>118</sup> See [http://www.trademarksa.org/about\\_us/programme\\_news/chirundu-one-stop-border-post-saves-us600-000-day](http://www.trademarksa.org/about_us/programme_news/chirundu-one-stop-border-post-saves-us600-000-day) accessed on 20th june 2015

<sup>119</sup> The most recent year for which statistical data is available for the percentage of paved road varies between countries, e.g. for Mauritius it is 2005; for Botswana it is 2004; for Malawi and Tanzania it is 2003; for Namibia and Zimbabwe it is 2002; for Angola, South Africa and Zambia it is 2001 and for Lesotho and Mozambique it is 1999 (SADC 2005 & 2006; World Bank 2007; Mutambara 2004).

<sup>120</sup> Tsitsi Mutambara, Regional transport challenges within the Southern African Development Community and their implications for economic integration and development, Chapter 2

<sup>121</sup> The WTO Legal Texts, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, General Agreement on Tariffs and Trade (1999) 437.

<sup>122</sup> SADC Trade Protocol, Article 3

driving force for these appears to be the need to protect and safeguard the local industry from international competition<sup>123</sup>. This was the case in Zambia as the Minister of Agriculture in that country confirmed the restrictions of exports in maize. It was deemed necessary to enact the ban until such a time as Zambia was able to consistently produce surplus maize for exports.<sup>124</sup>

More recently, Zimbabwe has through legislation introduced a surtax of 25% on a number of commodities which began in the year 2012.<sup>125</sup> This was enacted to protect Zimbabwean producers from what the government called “extensive imports.”<sup>126</sup> It follows that instead of SADC member states legislating rules that encourage and promote intra-regional trade, the rules which they introduce are inconsistent with the spirit and objectives of the Protocol and the SADC as a whole. The Protocol should have gone further in its provisions in this regard to automatically render such legislation inconsistent and consequently null and void.

### 3.5.3 **Rules of Origin**

The rules of origin enable the preferential trade agreements to be correctly implemented, which promotes the development of trade and encourages investment. They have been defined as ‘the specific provisions, developed from principles established by national legislation or international agreements applied by a country to determine the origin of goods.’<sup>127</sup>

Without such rules third country imports are likely to enter the preferential trade area through a lower tariff member of the trade agreement so as to avoid the payment of duties. This is called ‘trade deflection’ and is more likely to occur where the external tariffs of the REC vary greatly. These rules are not only necessary to protect against trade

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<sup>123</sup> It was reported that South Africa had imposed an import ban on all Zimbabwean exports. The move had meant that there was a negative impact on the exports of Zimbabwe as South Africa is a significant trading partner of that country. See [www.newzimbabwe.com](http://www.newzimbabwe.com) accessed on January 12 2015.

<sup>124</sup> Imani Development International Limited, *A survey of Non-tariff Barriers to Trade: Zambia* (2007) 23.

<sup>125</sup> Statutory Instrument 156 of 2011

<sup>126</sup> The Zimbabwe Herald, Wednesday 28 March 2012

<sup>127</sup> Annex D, currently Annex K to the Revised Kyoto Convention

deflection but are also essential in promoting local value addition.<sup>128</sup> This is in line with the idea that regional integration is an essential vehicle for which member states can utilize to promote industrialization. The trade protocol reflects this as it clearly states that the enhancement of the economic development, diversification and industrialization of the region is one of its main objectives.<sup>129</sup>

The rules of origin that were first agreed by SADC and described in the original trade protocol were simple, general and consistent with those in other developing country REC's.<sup>130</sup> They included both general conditions stipulating that simple packaging, assembly and labeling, for instance, are insufficient to confer originating status<sup>131</sup>, and specific rules setting out minimum levels of economic activity. Under the specific rules goods would qualify for SADC tariff preferences if they underwent a single change of tariff heading, contained a minimum of 35 percent regional value-added, or included non-SADC imported materials worth no more than 60 percent of the value of total inputs used.<sup>132</sup> Agricultural and primary products would need to be wholly produced or obtained in the region.

Moreover, certain SADC member states sought to establish more extensive rules of origin in what was seen as an attempt to afford protectionism to certain sectors in their respective economies. This consequently led to a change in the rules of origin regime. The amended trade protocol was changed and is now characterized by 'made-to-measure' sector-specific rules that are far more restrictive.<sup>133</sup> The change of tariff heading

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<sup>128</sup> This is where the goods are encouraged to be processed in a particular member state and exported as an end product rather than exporting raw materials which will be processed into a particular product at the export destination.

<sup>129</sup> SADC Protocol on Trade, Article 2 (4), (1996)

<sup>130</sup> Henry Kibet Mutai, *Regional trade integration strategies under SADC and the EAC: A comparative analysis*, SADC Law Journal (2011) Vol 1

<sup>131</sup> Rule 3 of Annex I to the Protocol

<sup>132</sup> Frank Flatters and Robert Kirk, *Rules of Origin as Tools of Development? Some Lessons from SADC*, (2003) at pg. 7

<sup>133</sup> Frank Flatters and Robert Kirk, *Rules of Origin as Tools of Development? Some Lessons from SADC*, (2003) at pg. 7



requirement was replaced by multiple transformation rules and detailed descriptions of the required production processes for products to be deemed originating from SADC.<sup>134</sup>

An annex to the trade protocol sets out the mechanics of the rules of origin in the SADC context. The rules outline a set of criteria in which goods can be said to be originating from a member state. Firstly, goods are deemed to be originating from a member state if they have been ‘wholly produced’ in a member state.<sup>135</sup> This includes products manufactured in a factory of a member state exclusively obtained from within the member states. Secondly, goods are considered as having originated from the member state, if those goods ‘have been obtained in any Member State incorporating materials which have not been wholly produced there, provided that such materials have undergone sufficient working or processing in any Member State within the meaning of paragraph 2 of this Rule.’<sup>136</sup>

Paragraph 2 then goes on to refer to a separate appendix setting out the conditions to be fulfilled by such products. The protocol outlines a specific set of columns for each product in relation to the harmonised system of tariffs which specifies whether or not (depending on the columns subscribed to the particular product) the product can be regarded as originating within the SADC region. These complex rules of origin are in themselves a barrier to trade within the region and thus undermine the central objective of the trade protocol to liberalise trade within SADC. The rules of origin are supposed to encourage producers to take advantage of them by gaining lower tariffs for their goods and thus encouraging trade. However if they confuse and complicate the determination of whether a product qualifies for the lower tariff, they would ultimately negatively affect the original objective.

The impact of such complex provisions is particularly highlighted when examined in light of the textiles/garment industries in the SADC region. This is one of the few manufacturing sectors in which there is significant production in a number of member states. There are differences in some areas in this market such as labor intensity and other

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<sup>134</sup> Henry Kibet Mutai, *Regional trade integration strategies under SADC and the EAC: A comparative analysis*, SADC Law Journal (2011) Vol 1

<sup>135</sup> SADC Protocol on Trade, Annex 1 Rule 4, (1996)

<sup>136</sup> SADC Protocol on Trade, Annex I, Rule 2(1)(b), (1996)

determinants of comparative costs at various stages in the textile and garment ‘value chain.’ This has meant that there are potentially significant complementarities among member states which if addressed by SADC trade initiatives such as the trade protocol, the region’s competitiveness in world markets may be enhanced.

Currently, the movement to SADC free trade in textiles and garments is slow, and the sector is subject to relatively complex transitional arrangements.<sup>137</sup> Most non-SACU Member States have postponed significant tariff reductions until very late in the transition process. The rules of origin require double transformation in order to qualify for SADC tariff preferences. Garments must be made from regionally produced textiles to qualify as originating from SADC. Fabric must be made from regionally produced yarns and equally yarn must be made from uncarded, uncombed fiber or from chemical products. It was stated that the rationale behind these double transformation rules is that they will encourage regional sourcing and deeper integration of the regional textile and garment industries. However, upon closer examination of the impact these rules has had on the industry appears to contradict this. These double transformation rules increased the cost production within the SADC region. This meant that the most efficient producers of textiles and apparels mostly based in Asia have increased their share in SADC imports at the expense of SADC member states. It is estimated that the share of Asian imports as a per cent of SADC’s total textiles and apparel imports has risen from 44% to 58% in the last decade.<sup>138</sup>

South African garment producers have expressed reservations at the rules stating that it would be difficult for them to meet the double transformation rules.<sup>139</sup> Since most South African garment makers cannot satisfy these rules of origin, due to the lower level of development of such industries in the wider region, it is highly unlikely that it could be met by non-SACU producers. Consequently, the SADC double transformation rule of origin will prevent preferential intra-SADC garment trade. This will enable South Africa to maintain its high protection policies on garments and fabric. Not only will it fail to

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<sup>137</sup> SADC Trade Database (2008)

<sup>138</sup> USAID Southern African Trade Hub, *Technical Report: SADC Rules of Origin in Textiles and Apparel* (2011)

pg.25

<sup>139</sup> Frank Flatters and Robert Kirk, *Rules of Origin as Tools of Development? Some Lessons from SADC*, (2003) at pg 20

promote intra-SADC trade in this sector, it will do little to promote the global competitiveness of SADC textile and garment producers. Ultimately, such complex rules of origin as obtained in the protocol do little to enhance and achieve the goals of the instrument and SADC as a whole.

This was further highlighted through empirical evidence which illustrated that where such rules were relaxed, exports in those sectors grew. The total value of exports in the textiles industry of the MMTZ countries to the region grew from US\$ 29 million in 2000 to US\$ 78 million in 2006, which is equivalent to 169% growth.<sup>140</sup> This was perhaps due to the fact that the double transformation rules of origin provided for an exception for these countries. Individually, in the same period Malawi's exports in textiles to the region grew 199% while Zambia's grew 278%.<sup>141</sup> It follows that the rules of origin are supposed to be a tool to encourage industrial development as is the case with the exception for the MMTZ countries. However they increase cost of inputs, as they do with the general rules of origin encompassed in the trade protocol, they might have a detrimental impact on the original objective. Under such prohibitive rules, SADC members may consider exporting to other destinations where trade requirements are less restrictive.

### **3.6 Impact on Trade**

SADC has implemented a solid foundation for accelerating regional trade and thus integration within the region. As outlined previously, the protocol established a 12 year implementation program for trade liberalization in the region in order to accelerate trade and integration. This tariff phase down process as captured in the Regional Indicative Strategic Development Plan (RISDP) is arguably SADC's most important legal instrument in the community's quest for deep economic integration as it sets the pace at which the elimination of intra-regional trade within the SADC will take place. Remarkable achievements have been made in the areas of goods and services integration, customs and in investment and finance.

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<sup>140</sup>SADC Trade Database (2008)

<sup>141</sup> SADC Trade Database (2008)

The main objective of the protocol was the establishment of a FTA in SADC by 2008 and then ultimately a customs union. The first steps were initiated with the trade liberalisation process which came into effect in September 2000. At the time the protocol was being implemented exports within SADC were valued at just over US\$ 50 billion. By 2006 after some years of implementing the protocol, this had more than doubled to more than US\$ 113 billion.<sup>142</sup> It was reported that since the creation of the free trade area in 2000, intra SADC trade nearly doubled from US\$5.02 billion to US\$10 billion in 2010, but the portion on SADC exports remained constant.<sup>143</sup> Similarly, other data has shown that total exports in merchandise from the region to the rest of the world grew from \$14 billion in 2000 to \$58 billion in 2011.<sup>144</sup>

Over all, intra-SADC trade actually decreased during the same period. The SADC region has actually reduced the amount of intra-regional trade during the period from 2008 to 2009 with a decrease from \$46.6 billion to \$38.8 billion<sup>145</sup> illustrating how despite the implementation of the Protocol problems of intra-SADC trade are not entirely resolved. However, even with tools such as the trade protocol in place there remains room for improvement if the goals and objectives of the protocol are to be achieved. The inconsistency and uneven impact of the Protocol is detrimental to the promotion of intra-regional trade. Whilst some countries honor their obligations under the Protocol, others demonstrate a contrary commitment.<sup>146</sup> The gaps within the Protocol have allowed certain member states to utilize them to hinder intra-regional trade through enacting measures that innately act as a barrier to trade. Ultimately, the Protocol has made some impact on the promotion of trade within the SADC region. However it fails to address pertinent issues that hinder intra-regional trade, thus it falls short of achieving its stated objectives.

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<sup>142</sup>MmatlouKalaba and MbofholowoTsedu, *Southern African Development Research Network: Implementation of the SADC Trade Protocol and Intra SADC Trade Performance*, at pg 4 (2008)

<sup>143</sup> T. Iwanow, *Impact of Derogations from Implementing the SADC FTA obligations on intra-SADC trade*, (2011)

<sup>144</sup>*SADC Statistics Yearbook, Intra-SADC Trade for SADC* (2011) available at <http://www.sadc.int/information-services/sadc-statistics/sadc-statiyearbook/>

<sup>145</sup>*SADC Statistics Yearbook, Intra-SADC Trade for SADC* (2011) available at <http://www.sadc.int/information-services/sadc-statistics/sadc-statiyearbook/>

<sup>146</sup> TRALAC Report, *Uneven Progress in SADC FTA* (2013)

### 3.7 Conclusion

It follows that although the Protocol contains flaws which hinder trade its implementation has had some positive impact on the flow of trade within the region. In 2000, trade between these SADC Members amounted to only US\$ 6.67 billion. By 2009, intra-SADC trade had more than doubled to just over US\$ 18 billion.<sup>147</sup> Exports from the region to the rest of the world had also grown exponentially.<sup>148</sup> However, growth in trade has not been consistent. In the period between 2008 and 2009 intra-SADC trade decreased in monetary value.<sup>149</sup> It appears that the gaps and weaknesses contained in the trade protocol have contributed to this inconsistency.

The protocol outlined a phase down tariff reduction of 8 years in order to facilitate trade within SADC. The period given for these reductions may appear to have been unwarranted. Eight years was a long period of time to reduce these barriers to intra-regional trade thus slowing down the goal to completely eliminate them. Although this period elapsed it would have been beneficial to the flow of intra-regional trade to have had a shorter period to remove these barriers. It would have facilitated trade within the SADC at a faster rate. Although it is important to consider member states that might be adversely affected by the sudden removal of all barriers to trade, it is equally essential not to take a laissez-fair approach in eliminating regional trade barriers.

Increased trade between SADC countries might encourage them to specialize in order to gain a competitive advantage against neighbors that currently produce similar goods. It could assist in creating economies of scale within the region. The swift elimination of intra-SADC trade barriers has the potential to diversify and grow SADC economies. The slow pace of implementing agreed commitments on trade is likely to undermine the potential benefits of the trade protocol.

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<sup>147</sup> AECOM International Development, *Audit of the Implementation of the SADC Protocol on Trade* (2011), at para. 2.2 pg. 10

<sup>148</sup> MmatlouKalaba and MbofholowoTsedu, *Southern African Development Research Network: Implementation of the SADC Trade Protocol and Intra SADC Trade Performance*, at pg 4 (2008)

<sup>149</sup> *SADC Statistics Yearbook, Intra-SADC Trade for SADC* (2011) available at <http://www.sadc.int/information-services/sadc-statistics/sadc-statyearbook/>

Moreover, derogation provisions within the Protocol could hinder the promotion of intra-SADC trade. The protocol provides for a number of derogations from the obligations established within it for example, the gradual phase down of tariffs. Although ensuring that any detrimental effects on a particular industry of a member state may be offset, this provision lacks a monitoring mechanism to regulate such derogations. The Protocol should have gone further to articulate or establish a set procedure for monitoring compliance with the exemptions. The lack of this has meant that the provisions are open to abuse by Member States who willingly invoke the derogation provisions with motives that innately hinder the objectives of the protocol and the objectives of SADC as a whole.

This is further compounded by a further provision in the protocol which deals with third party preferential agreements within SADC. The protocol permits member states to grant or maintain preferential trade agreements with third parties as long as they do not impede or frustrate the objectives of the protocol and that these should be extended to other members.<sup>150</sup> The protocol falls short of creating a common external tariff policy in dealing with non-member states. In the interest of cementing the creation of a customs union and ultimately a common market, the trade protocol should have enunciated the creation of a common external tariff.

Perhaps one of the biggest challenges found within the trade protocol lays with the challenges caused by non-tariff barriers namely, qualitative restrictions and the rules of origin. During the negotiation process, certain member states demanded a tightening of these rules. Certain interest groups cited concerns that because of weak customs administration in many SADC member states there was a possibility for non-originating goods to claim preferences.<sup>151</sup> Consequently, the organization enacted more complex rules of origin especially in manufactured products such as electronics and electrical goods, textiles and garments, and motor vehicles.

These complex rules are not only a barrier to trade, but require a time consuming exercise in ascertaining the products conformity. Traders within the region are likely to be

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<sup>150</sup> Development Policy Research Unit University of Cape Town, *What are the Critical Issues Arising from the SADC Trade Integration Process?*, DPRU Policy Brief No. 00/P3 July (2000) at pg. 7

<sup>151</sup> Paul Kalenga, *The Implementation of the SADC Trade Protocol: Some Reflections*, (2000) at pg. 5

deterred to use the rules which will further hinder intra-regional trade. It is necessary for SADC to simplify these rules if any attempt at increasing intra-regional trade is to register any meaningful success. Consequently, it is not surprising that without addressing these issues, the protocol on trade is unlikely to significantly increase intra-regional trade in line with its states objectives.

## CHAPTER FOUR

### SADC and the EAC: A Comparative Analysis

#### 4.1 **Introduction**

The following discussion will attempt to highlight how the approach of the East African Community (EAC) has assisted that region in promoting economic integration of the region and ultimately accelerating intra-regional trade. Particular emphasis will be placed on how the structural mechanics of the institutional framework have helped create a solid foundation for economic integration. Through an examination of the way the mechanics of the organization function it will illustrate how similar challenges faced by SADC have been dealt with by the EAC. The chapter will outline the successes of the EAC thus far and illustrate how this goal might just be attainable. In light of this and the preceding discussion, this chapter will examine if perhaps the EAC may be a model for regional integration for SADC.

#### 4.2 **The EAC: Background**

Like the SADC region, the history of regional integration in the East African Community (EAC) dates back to the colonial era. Regional integration here was also seen as a catalyst for affluence and economic growth. The initial moves towards cooperation between Kenya and Uganda were made as early as 1917<sup>152</sup> under British colonial rule. These states formed a customs union which had subsequent changes to the agreements during the period covering 1917 – 1949. Unlike most customs unions which have the objective of trade creation, this early attempt at regional integration was focused on revenue collection between these states. There existed a single customs administration for the two territories of Kenya and Uganda. The customs union was further extended to cover Tanganyika (now Tanzania) in the 1920's however; Tanzania maintained its own customs administration until early 1949.

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<sup>152</sup> Eliawony j. Kisinga, *Industrial and Trade Cooperation in Eastern and Southern Africa*, (1991) at pg 52



It follows from the foregoing that as a result of the customs union in east Africa, the economies of the region were substantially integrated. As a corollary there was a common external tariff, a customs union and/or common market and a common income tax structure. Despite this, so far the attempts at regional integration in the east African region remained more of an effort to harmonize the administration of services rather than a solid attempt at creating a customs union. Moreover, the underlying problem of unequal distribution of costs and benefits remained the most potent stumbling block in the regional integration endeavor.

The first EAC consisted of a common market with corporations and common services. However, sometime after its establishment, it became clear that the organisation was not going to survive. There was a severe lack of steering functions due to a lack of direction for the EAC. In 1977 the member states of the first EAC withheld the approval of the budget for the year beginning 1 July 1977<sup>153</sup>. Thus in that year the first EAC collapsed.

#### 4.2.1 **The Current EAC**

It follows from the foregoing that Kenya, Tanzania and Uganda continued to pursue economic integration through individual multilateral agreements. A groundbreaking announcement in this regard was made in November 1991 as the heads of state of the three countries articulated a strong intention to re-launch the EAC. Essential steps towards establishing this new EAC community were taken in 1993 at two summits of the heads of state. In the same year, the Permanent Tripartite Commission for Cooperation was established. It was envisioned that this would stand as a coordinating institution for the ultimate establishment of the new EAC. In 1994 provision was made for the establishment of a secretariat of the commission which was to begin working towards establishing the new REC in 1996. The following year the heads of state pushed the commission to work towards the upgrading of the earlier treaty establishing the EAC.

Ultimately, the commission in 1998 produced a draft treaty for the new EAC. During this period, cooperation on other matters such as security was also initiated. By November 1999, the Treaty for the Establishment of the East African Community (the

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<sup>153</sup> Wolfe Braude, *Regional Integration in Africa; Lessons from the East African Community* (2008), at pg 62

Arusha treaty) was signed by the heads of state of Uganda, Kenya and Tanzania and subsequently entered into force on 7<sup>th</sup> July 2000 with the formal launch of the new EAC taking place in January 2001. Two new members, Rwanda and Burundi, later joined the Community in 2007.

With the dawn of a new EAC, the leaders of the region consolidated their desire to pursue economic integration in the region. This was highlighted as the EAC's primary aim is to 'develop policies and programs aimed at widening and developing co-operation among the partner states in political, economic, social and cultural fields.'<sup>154</sup>

In pursuit of these aims the EAC envisions that this would be complimented by an endeavor to ensure the attainment of sustainable growth and development of the partner states through promoting balanced and equal development in the region<sup>155</sup>. This is a reflection of the overriding concern that the benefit of the regional integration agenda in this region was largely favoring the Kenyan economy. Greater attention has been paid to fair distribution of the benefits of cooperation as this was a severe stumbling block to the successful functioning of the former EAC. The new EAC ensures this through transitional customs regulations which are designed to protect the Tanzanian and Ugandan economies from the dominance of Kenyan exports.

The disparities between the economies within an REC's can be a significant stumbling block to the efficiency and ultimately to the success of the bloc. This problem is most poignantly evident in SADC as the South African economy is significantly larger than any other economy in that region. A dominating regional economy should be prepared to accept the benefits of integration such as access to the regional market whilst at the same time maintain policies which although might seem to favor the other members of the block, seek to restrict the entrenchment of the economies of the other member states. This prevents products from the larger economies flooding the markets of the smaller less developed states thus completely undermining the idea of comparative advantage which regional integration is supposed to encourage.

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<sup>154</sup> Arusha Treaty, Article 5(1)

<sup>155</sup> Article 5(3)

Such policies must aim to act as a catalyst for creating comparative advantages in the region through the promotion of investments by governments from the dominant economy into the rest of the region. These investments could lay the foundation for the promotion of the production capacities of these other states thus ultimately encouraging industrialization which is essential in promoting economic growth and development. In the long run, this would in turn benefit the larger economies in these regions. The importance of this is further consolidated in Article 6(e) which stipulates that the equal distribution of benefits is one of the organization's fundamental principles.

The EAC aims to achieve integration through four distinct phases. These are a customs union, a common market, a monetary union and finally a political federation. The customs union officially came into force in January 2005 amid discussions of developing the protocol for a common market that will include provisions for the free movement of persons, labor and services, and freedom of business establishment within the EAC. This can be seen as a significant departure from the traditional approach taken by regional economic communities. Whereas most REC's such as SADC began integration through establishing preferential trade blocs, the Arusha treaty seems to take the view that economic integration begins in earnest through the creation of a customs union.

The EAC also outlined operational principles to assist in the implementation of these objectives. One of which is the 'establishment of an export oriented economy for the partner states in which there shall be free movement of goods, persons, labor, services, capital, information and technology<sup>156</sup>.'

Here the EAC consolidates its ground breaking efforts at regional integration through wording that illustrates a clear intent to create a common market. The aim to create an export oriented economy further demonstrates the fundamental idea that the regional integration endeavor acts as a catalyst for industrialization within the member states. The Arusha treaty moves on to attach conditions on which member states must fulfill in pursuit of this. Member states are obliged to align their economic policies with those of the community, and refrain from any action which may undermine the implementation of these

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<sup>156</sup> Arusha Treaty, Article 7 (c)

aims and objectives<sup>157</sup>. Moreover, member states were given a timeline of 12 months from the entry into force of the treaty to enact legislation necessary for the implementation of the Arusha treaty<sup>158</sup>.

It follows from the foregoing that the Arusha treaty represented a new innovation in regional integration in Africa and departed from the traditional approach to the stages of economic integration. A new feature was introduced which other REC's in Africa have so far not included in their treaties. The Arusha treaty implores member states to provide regulations, directives and legislation of the community the force of law in their respective states<sup>159</sup>. This seminal provision is crucial in the effective and efficient implementation of the organisations trade policies as it allows those policies to be directly effective. Practically, it has the potential to have a far reaching effect on the mechanics of the regional integration efforts in the region. This is consolidated by a similar provision which articulates that the 'community organs, institutions and laws will take precedence over similar national matters' in relation to the implementation of the treaty<sup>160</sup>.

The new organisation has also made changes to the way the former EAC was functioning. The management of cooperation has been improved through setting up permanent institutions. Secondly, the EAC now allows civil society and market forces to play a more prominent part. The EAC appears to have come back with a strong framework from which to accelerate economic integration in the region. This is a welcome departure from the apparent failures the organisation experienced previously.

#### 4.2.2 **EAC Institutional Framework**

The Arusha treaty established a number of core institutions to manage the mechanics of regional integration in the region. These institutions when examined in light of their establishing treaty appear to have an innate separation of powers principle

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<sup>157</sup> Arusha Treaty, Article 8 1(b) and Article 8 (1) (c)

<sup>158</sup> Arusha Treaty, Article 8 (2)

<sup>159</sup> Arusha Treaty, Article 8 (2) (b)

<sup>160</sup> Arusha Treaty, Article 8 (4)

enshrined in them<sup>161</sup>. The treaty established the Summit of the heads of state of government, the Council, the Co-ordination Committee, Sectoral committees, the East African Court of Justice (EACJ), East African Legislative Assembly (EALA) and the Secretariat<sup>162</sup>.

The summit consists of the heads of state of government and much like many African REC's, it is the highest executive organ of the EAC. It is there to provide the general direction towards the realization of the goals of the organisation. Although it may delegate some of its functions such as the review of peace and stability in the region, the summit cannot do so in relation to its core functions. These include the appointment of the Judges of the court of justice, the admission of new members and assenting to the bills of the EAC. The meetings of the summit occur once every year, however, extraordinary summits maybe called by any member state. These are chaired by a chairperson. The position is rotates on a yearly basis. The decisions of the summit are taken by a consensus with its business discussions submitted to it by the council. The summit determines its own rules of procedure subject to the provisions of the treaty<sup>163</sup>.

On the other hand, the council of ministers is the main decision making institution. It consists of ministers from each of the member states responsible for EAC affairs and such other ministers as the summit may deem relevant<sup>164</sup>. The duty of the council is to promote, monitor and keep under constant review the implementation of the programs of the community. They must also ensure the proper functioning and development of the community in line with the provisions of the treaty. The council also has the responsibility of passing on bills to the legislative body for enactment, establish the sectoral committees and consider the budget of the community among others<sup>165</sup>. Most significantly, the Arusha treaty gives the council the power to make regulations and issue directives<sup>166</sup> which may

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<sup>161</sup> Edward Kafeero, *Customs Law of the East African Community in light of WTO Law and the Revised Kyoto Convention*(Munster, 2009), 95 at para 4.2.4.2

<sup>162</sup> Arusha Treaty, Article 9 (1)

<sup>163</sup> See [http://www.eac.int/index.php?option=com\\_content&view=article&id=130&Itemid=151](http://www.eac.int/index.php?option=com_content&view=article&id=130&Itemid=151) accessed on September 14 2014

<sup>164</sup> Arusha Treaty, Article 13

<sup>165</sup> Arusha Treaty, Article 14

<sup>166</sup> Arusha Treaty, Article 14 (3) (d)

be given full force of law as per earlier provisions in the treaty<sup>167</sup>. As outlined earlier this is a significant element in the mechanics of the EAC institutions. An apparent change from the dominance of the summit in creating binding decisions as is the case with most African REC's.

Meanwhile, the co-coordinating committees consist of permanent secretaries responsible for regional cooperation in each of the member states and reports to the council directly. It is tasked with coordinating the activities of the sectoral committees as well as being responsible for regional cooperation. It is also responsible for monitoring the implementation of the treaty and the execution of the decisions of the council<sup>168</sup>. The sectoral committees which are overseen by the coordinating committees develop comprehensive implementation programs in various sectors and monitor their implementation. They are established by the council upon the recommendation of the coordinating committees. They must be deemed necessary for the achievement of the objectives of the EAC to be established.

One of the most important organs of the EAC is the EACJ. This is the judicial organ of the EAC and its role is to ensure that community law is interpreted and applied in a consistent manner with the objectives of the Arusha treaty. Significantly, the treaty extends the jurisdiction of the court beyond what most African REC's have so far done. It provides for the extension of jurisdiction of the EACJ to such matters as 'original, appellate, human rights and other jurisdiction' which the council of ministers may deem relevant<sup>169</sup>. This must be implemented through the enactment of a protocol.

The Arusha treaty also provided for the establishment of the EALA. The body is the main legislative organ of the EAC and provides a forum of debate for issues affecting the organisation. It has a cardinal function in the promotion of the community objectives. This is reflected in the mission of the body which articulates an intention to legislate, do oversight and represent the people of east Africa in an attempt to foster economic, social,

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<sup>167</sup> Article 8 (2) of the Arusha Treaty possibly means that the regulations and directives of the council can be directly applied in each of the member states

<sup>168</sup> Arusha Treaty, Article 18

<sup>169</sup> Arusha Treaty, Article 27

cultural and political integration<sup>170</sup>. The treaty stipulates that the EALA's duties include liaising with the national assemblies of the Partner States on matters relating to the Community; debating and subsequently approving the budget of the community; considering the annual reports on the activities of the community, annual audit reports of the Audit Commission and any other reports referred to it by the Council; discuss all matters pertaining to the community whilst making recommendations to the Council as it may deem necessary for the implementation of the treaty<sup>171</sup>.

Furthermore, the treaty established the secretariat of the EAC as the executive organ of the organisation. It consists of the secretary general, deputy secretary general, counsel to the community, and other unspecified offices which may be established by the council as and when they are deemed necessary<sup>172</sup>. The secretariat also ensures that the regulations and directives issued and adopted by the council are properly implemented. Ultimately its duty is to ensure the efficient administration of the functions of the community; forwarding bills to the assembly through the coordination committee and planning, monitoring and management of the programs of the community.

The organisation's overall policy direction has been influenced by a succession of development strategies. The first of these came into effect in the late 1990's, prior to the establishment of the current EAC. This was named the East African Co-operation Development strategy and was in operation from 1997 up until 2000. It focused on the development of a policy framework for regional co-operation which as previously outlined lead to the enactment of the Arusha treaty. The second development strategy subsequently focused on the implementation of the treaty and ran from the period beginning 2001 and ending 2005. This concerned itself with the implementation of regional projects and the establishment of the customs union. Most recently, the third development strategy between 2006 and 2010 sought to prioritize the development of areas relating to the promotion of

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<sup>170</sup> See <http://www.eala.org/component/content/article/26-overview/13-welcome-to-the-east-african-legislative-assembly.html>, accessed on September 15 2014

<sup>171</sup> Arusha Treaty, Article 49

<sup>172</sup> Arusha Treaty, Article 66

peace and security, common economic interests and human resource development in east Africa among others<sup>173</sup>.

The EAC also includes a number of autonomous institutions which are responsible for various functions relating to the development of the EAC. They were established by the summit under the article 9 (1) (h) of the treaty and they deal with issues ranging from environmental issues to financial and educational matters. These institutions include the Lake Victoria Basin Commission, the Lake Victoria Development Programme, the East African Development Bank (EADB), the Lake Victoria Fisheries Organisation and the Inter-University Council for East Africa<sup>174</sup>. Most notably the EADB offers a broad range of financial services in the member states of Kenya, Uganda, Tanzania and Rwanda with an overriding objective of strengthening socio-economic development and regional integration. As of December 2007 the capital structure of the bank had been increased from US \$69 million to US \$150 million with an equity fund of up to \$500 million<sup>175</sup>. This ensures that the bank provides financial and related assistance to enterprises in the member states which, by their activities, are expected to make a positive contribution to socio-economic development and ultimately contribute to the economic integration of the region.

#### **4.3 The EAC Customs Union**

In light of the analysis at hand, the most relevant aspect of the EAC in relation to the SADC protocol on trade is the EAC Protocol on the Establishment of The East African Customs Union (the customs union protocol). One of the fundamental and seminal steps towards trade liberalization in the EAC came with the establishment of the customs union. The customs union protocol was signed by the presidents of the member states at a summit of the heads of state on the 2<sup>nd</sup> of March 2004 and came into force on 1<sup>st</sup> of January 2005. It was envisaged that by 2010 the EAC would have created a fully functioning customs union. Consequently, the member states adopted the East African Community Customs Management Act. This is an act of the community which is applied across the EAC as the main legal instrument for the operationalisation of the custom union.

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<sup>173</sup> Wolfe Braude, *Regional Integration in Africa; Lessons from the East African Community* (2008), at pg 74

<sup>174</sup> Wolfe Braude, *Regional Integration in Africa; Lessons from the East African Community* (2008), at pg 71

<sup>175</sup> Edward Kafeero, *Customs Law of the East African Community in light of WTO Law and the Revised Kyoto Convention*(Munster, 2009), 99 para. 4.2.4.2



Central to the objectives of the customs union is the promotion of intra-regional trade through the elimination of internal tariffs and non-tariff barriers in an attempt to create one large single market and investment area<sup>176</sup>. The policies relating to trade between the member states and non-members (external tariffs) were to be harmonised. As was the aim within the SADC region, the EAC member states ultimately sought to create economies of scale subsequently promoting economic development through rapid industrialisation. To achieve this, the protocol stipulates areas in which the member states are to cooperate. Specifically, the customs union protocol provides that member states cooperate in among others;

‘matters concerning trade liberalisation; trade related aspects including the simplification and harmonisation of trade documentation, customs regulations and procedures with particular reference to such matters as the valuation of goods, tariff classification the collection of customs duties, temporary admission, warehousing, cross-border trade and export drawbacks...<sup>177</sup>,

The provisions ensure that member states create uniform policies and procedures assisting the region to harmonise and integrate efficiently. This will ensure that there is a more stable and predictable economic environment for investors and traders in the region. Complementing these provisions, the protocol further stipulates that member states must exchange trade information for the prevention, investigation and suppression of customs offences as well as the operation of a harmonised information system to facilitate the sharing of customs and trade information<sup>178</sup>. This included an undertaking to standardise their customs nomenclature and standardise their foreign trade statistics to ensure comparability and reliability of the relevant information.

Member states are also obliged to reduce the number and volume of documentation required in respect of trade among them. The simplification of trade documents aims to facilitate intra-regional trade in goods as it addresses one of the non-tariff barriers to trade. This is further complimented by the Harmonised Commodity Description and Coding System<sup>179</sup>. Initially, the tariff system was based on the 2002 version of the harmonised

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<sup>176</sup> Customs Union Protocol, Article 3

<sup>177</sup> Customs Union Protocol, Article 4 (1)

<sup>178</sup> Customs Union Protocol, Article 5

<sup>179</sup> Customs Union Protocol Article 8 (2)

system however, in June 2007 the EAC common external tariff was revised to conform to the 2007 version. This came into force on the 1<sup>st</sup> of July 2007<sup>180</sup>.

This is specifically relevant in the SADC context due to the challenges posed by NTB's in that region. The administration documents and processes within SADC border posts remain a hindrance to trade as the Protocol fails to address them. As such a lesson could be drawn in this regard in order to ensure the removal of these NTB's and facilitate trade.

#### 4.3.1 **Internal/Common External Tariff**

The customs union protocol requires that all member states remove and eliminate all internal tariffs. This covers all tariffs in relation to goods from a member state which are being traded into another member state and other charges of equivalent effect, subject to the principle of asymmetry. The asymmetry principle recognises that the member states may be at different levels of development. As such those member states that are at a less advanced level are entitled to a measure of protection of their domestic industries in order to spur growth. This reflects earlier concerns about the disparities between the larger Kenyan economy compared to those of the economies of the other member states. This was especially more vital with the addition of Rwanda and Burundi into the EAC.

If the customs union were not to have taken account of the disparity between the region's economies, these differences may have been aggravated further. It follows that the protocol provided for a transitional period of 5 years from the coming into force of the protocol for the elimination of these internal tariffs<sup>181</sup>. To this end goods from Uganda and Tanzania into Kenya were granted duty-free status as at the effective date of the protocol, whilst goods from Kenya into Uganda and Tanzania were grouped into two categories – Category A goods, which were eligible for immediate duty free treatment and Category B goods, which were eligible for gradual tariff reduction over a period of five years<sup>182</sup>.

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<sup>180</sup> Edward Kafeero, *Customs Law of the East African Community in light of WTO Law and the Revised Kyoto Convention*(Munster, 2009), pg 114 para 5.2.1.4

<sup>181</sup> Customs Union Protocol, Article 11 (1)

<sup>182</sup> Customs Union Protocol, Article 11 (2) and (3)

In addition to the elimination of internal tariffs, the member states sought to create a common external tariff (CET) in relation to non-EAC member states. This is one of the most important elements of the customs union. The EAC agreed to a three-band CET; a minimum rate of zero percent, a middle rate of 10 percent and a maximum rate of 25 percent<sup>183</sup>. The rates are to be applied to primary and capital goods, intermediate goods and final products respectively. The primary goods are said to be essential for production thus were given the lower rate thus helping to boost manufacturing in the EAC. Intermediate goods under this provision are those which have been processed but still require some other processing to be complete. While final goods are end products which have been fully processed and are ready for consumption. Moreover, the maximum rate is subject to review after five years from the effective date of the Protocol.

The EAC member states agreed during the negotiations that under the tariff rates there would be special safeguards for protecting particular revenues stemming from particular industries. As such, the tariff system introduced special tariff rates for goods such as rice, wheat, milk, flour, sugar, cigarettes cement and cotton among others. Collectively, these sensitive items are equivalent to approximately 361 tariff lines and are estimated at about 20 percent of total imports in the region. The EAC member states agreed that the sensitive items would attract rates of more than 25 percent and, in some instances, a mixture of specific duty and ad valorem rates<sup>184</sup>. The common external tariff entered into force in January 2005.

These protectionist measures reflect a skepticism by most African countries involved in regional integration schemes to fully liberate trade. Similarly, SADC has also had to confront similar issues in relation to products such as sugar which were given import quotas in some member states of that region. It can be said that such policies are innately restrictive of trade and thus ultimately undermine the efforts towards regional integration in the respective regions. These may appear to encourage weak industries to strengthen and become more competitive, but they remain a barrier to trade and thus regional integration.

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<sup>183</sup> Customs Union Protocol, Article 12

<sup>184</sup> Meredith McIntyre, *Trade Integration in the East African Community: An Assessment for Kenya*, IMF Working Paper (2005), at pg. 11

#### 4.3.2 **Non-Tariff Barriers and National Treatment**

Naturally, the Arusha treaty provides for the removal of non-tariff barriers and also provides for the national treatment principle which is central to any regional integration initiative. The protocol places a duty on member states to immediately and completely remove any non-tariff barriers. Non-Tariff Barriers (NTBs) refer to restrictions that result from prohibitions, conditions, or specific market requirements that make importation or exportation of products difficult and/or costly. These are essentially anything apart from actual tariff restrictions. However, the EAC defines NTB's as quantitative restrictions and specific limitations that act as a hindrance to trade.

As a corollary, the protocol further prohibits partner states from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other partner states. In addition partner states are prohibited from imposing on goods originating from other partner states internal taxation in excess of that imposed on similar domestic products. It is essential for the non-tariff barriers to be removed so that the benefits of liberal trade may be achieved. If not addressed the non-tariff barriers may vitiate most of these benefits.

In 2006 the EAC council of ministers adopted a mechanism for monitoring non-tariff barriers. Before this, the member states had used an ad hoc system which was supported by the business community within the region. The secretariat in collaboration with the East African Business Community had developed simplified guidelines and publicity material for use in implementing the removal of non-tariff barriers. A trade remedies committee was also established with a duty to refer complaints to the secretary of the relevant sectoral council for further investigation.

Moreover, as with most regional integration schemes, specific provisions were enacted to enshrine the principle of national treatment. The objective of this principle is to prohibit discrimination by a partner state against goods originating from another partner state, by requiring that partner states accord the same treatment to goods imported from other partner states as they would give to goods produced domestically. It follows that any member state is prohibited from enacting 'legislation or apply administrative measures

which directly or indirectly discriminate against the same or like products of other partner states.’

Despite this, a number of NTB’s remained which effectively hindered trade within the region. The East African Business Council (EABC) released a report which highlighted a few of these. These included Customs and administrative documentation procedures; Immigration procedures; Cumbersome inspection requirements; Police road blocks; Varying trade regulations among the three EAC countries; Varying, cumbersome and costly transiting procedures in the EAC countries; Duplicated functions of agencies involved in verifying quality, quantity and dutiable value of imports and exports; and Business registration and licensing<sup>185</sup>. It is clear to see that similar NTB’s exist within the SADC region as well as within other REC’s.

NTB’s negatively affect the productivity of the EAC as they increase the cost of doing business and delay the overall business transactions. These hurdles ultimately hinder importers and exporters thus deter them from engaging in cross-border trade. It was this envisaged by the EABC that the introduction of the customs union Protocol would go some way in addressing these concerns.

Under Article 13 of the Protocol on the establishment of the EAC Customs Union, each member state is obliged to remove all the existing non-tariff barriers to the importation into their respective territories of goods originating from another member state and thereafter not impose any new non-tariff barriers. SADC has also taken a similar approach with a corresponding provision in its protocol on trade. However, the EAC has gone further to establish mechanisms to monitor and eliminate NTB’s and establishing in each member state institutions for their removal. Such mechanisms include re-occurring studies of NTB’s within the region and a time bound NTB program which is constantly being updated<sup>186</sup>. This reflects the revolving nature of NTB’s and represents a significant effort in reducing the effects of NTB’s on trade.

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<sup>185</sup> East African Business Council, *Business Climate Index 2008* found at [www.eac.int/customs/index.php%3Fopt](http://www.eac.int/customs/index.php%3Fopt) accessed on December 21st 2014

<sup>186</sup> Dr R. Sezibera, Let’s Rid EAC of These Non Tariff Barriers, SG Blogs on Dedicated Ministerial Meeting on Elimination of NTB’s found on [www.eac.int/sg/](http://www.eac.int/sg/) accessed on January 15<sup>th</sup> 2015

The problems related to NTB's and their negative effects on trade are a re-occurring feature of any attempt at regional integration. The EAC has been effective in addressing this inherent nature of NTB's as the EAC Secretariat is tasked with resolving these issues as and when they occur. In some cases a National Monitoring Committee (NMC) handles them while in other cases they are dealt with by a Regional Monitoring Committee (RMC). Further still, the EAC has in some instances sought bilateral solutions between member states in order to reach a satisfactory resolution in reducing the effect of the NTB.

Perhaps the most far-reaching mechanism for dealing with NTB's invoked by the EAC is in its online monitoring system. This system makes it possible for any stakeholder to directly report to the EAC Secretariat on any experience they have had with NTB's<sup>187</sup>. The system enables the EAC to monitor NTB's as they occur practically as businesses and traders operate in their cross border transactions. It ensures that the changing nature of NTB's as they hinder trade on a daily basis is reported and documented to allow the EAC to respond with tailored solutions. This is a swift and effective way not only to eliminate NTB's but ultimately to facilitate trade within the region.

It is imperative that any REC's response to NTB's be constantly evolving in order to effectively eliminate the far-reaching detrimental effects of these barriers to trade. This is where the EAC has managed to respond effectively and efficiently to one of the most significant challenges faced by any regional integration scheme. However, in order to cement the gains made by the provisions of the customs union protocol of the EAC, there needs to be a separate and fully functional body which not only enforces these provisions but allows interested stakeholders to invoke them as a matter of law. Such a body would be extensive in its ability to promote intra-regional trade and integration.

Similarly, the EAC first established bodies tasked with outlining a way forward for the region in the integration initiative. Once established the goal on boosting intra-regional trade through the customs union was further boosted through the establishment of a fast track committee with a mandate to find and propose different ways and means of

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<sup>187</sup> Dr R. Sezibera, Let's Rid EAC of These Non Tariff Barriers, SG Blogs on Dedicated Ministerial Meeting on Elimination of NTB's found on [www.eac.int/sg/](http://www.eac.int/sg/) accessed on January 15<sup>th</sup> 2015

promoting intra-regional trade. The committee has so far filed a report as to ways in which the EAC can move forward to integrate and eventually create a political federation for the purpose of facilitating trade within the region<sup>188</sup>.

This is a distant approach than that taken by SADC. Central to the goals of SADC, was the traditional approach to establishing a regional economic bloc. The organization sought to first establish a preferential trade area, then a free-trade area, customs union and a common market. SADC makes no mention of the desire to create a political federation (although its stated aims could be evidence towards this). As such the approach of SADC appears to be a more *laissez faire*. The EAC on the other hand, has a more aggressive attitude in promoting intra-regional trade reflected in the way the organization literally skips the first stages of regional integration and makes establishing a customs union a first step in the process.

#### 4.4 **Rules of Origin**

In order for the previously outlined provisions to be effective, it is essential that goods originating within the EAC and outside of the region can be distinguished. One has to ascertain where the goods are from in order to establish which tariff to allocate to that particular product. They represent a legal framework within which the origin of goods is determined, both at point of shipment and where they are deemed to have been produced. However within the context of the EAC as well as SADC, rules of origin agreements are weakened by member states' parallel memberships of different trade blocs. In the EAC particularly, Tanzania is one such example. The country is both a member of SADC and the EAC. This reflects an obstacle to regional integration in Africa. Many African countries have dual membership.

It is against this background that the Customs Union Management Act enacted in 2004 articulates that goods originating from outside the EAC will be given community tariff treatment in accordance with the rules of origin provided for under the protocol establishing the customs union. Annex III to the protocol encompasses the rules of origin.

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<sup>188</sup> Wolfe Braude, *Regional Integration in Africa; Lessons from the East African Community* (2008), at pg. 66

It stipulates that goods shall be deemed to have originated within the EAC where they are ‘wholly produced as provided for in Rule 5 of these Rules; or (b) they have been produced in a Partner State wholly or partially from materials imported from outside the Partner State.’

The aim of the provision was not only to ensure the implementation of the classification system but also to ensure uniformity among member states. It follows that when compared to the SADC rules of origin, the EAC rules articulate much simpler criteria for determining the origin of the goods in question. Goods have fewer hurdles of classification before they are determined to be from within the EAC while goods in SADC have to go through further more complex classification before obtaining their origin within SADC.

This in itself ensures that the rules of origin in the EAC serve their purpose in eliminating barriers obtaining the classification of goods within the tariff system. If the rules of origin are too complex, they will ultimately serve as a barrier to trade as most traders who may qualify for a lower tariff classification may not be able to do so.

Ultimately this would stifle intra-regional trade. Despite these simpler rules, the application of them has led to disputes within the EAC. In July 2010, Tanzania had refused to allow vehicles assembled in Kenya duty free on the grounds that they did not meet the requirements of the rules. This led to a slowdown of expansion of the Kenyan firms into the EAC region adversely affecting the regional integration efforts envisaged by the customs union protocol.

Following this dispute the EAC had to establish a verification commission to assess the vehicles and ascertain their compliance with the rules of origin. Simple operations such as packaging, mixing and assembly where the costs of the imported ingredients, parts and components used in any processes exceed 60 per cent of the total cost of the final product is not recognised under the rules of origin. The argument raised by Tanzania in this situation appears to be an attempt to further complicate the rules of origin as they required



specific technical information as to the components of the manufacturing process<sup>189</sup>. This is clearly against the spirit and objective of the customs union protocol which aims to liberalise trade within the region. Blocking the sale of locally assembled vehicles in the region is a double loss because the member states would be flouting the common external tariffs.

It would appear that while the rules remain simple in an attempt to foster intra-regional trade, there is need for an agreement on the meaning of the rules of origin themselves. This should include internal tariff structures and local content regulations merely for the settlement of disputes and not for the determination of the tariff classification. Consequently, the EAC in 2006 introduced a manual on the rules of origin which deals with some of these issues. The East African Community Manual on the Application of East African Rules of Origin (rules manual) not only seeks to act as a tool for the training purposes of customs officials but also as a guide to traders, manufacturers, government officials and any other agencies or stakeholders involved in trade within the region. The rules manual essentially covers ‘the provisions governing the determination of the origin status of goods under the intra-EAC trade, the administration procedures of the rules of origin, simplified procedures for small scale cross border trade and organizational requirements for implementing the rules of origin<sup>190</sup>’.

The manual further seeks to translate the rules of origin for a practical translation, which allows for the smooth application of the rules of origin provisions. This ultimately ensures that the rules of origin provisions do not act as an unwitting barrier to intra-regional trade. A similar approach should and must be taken by SADC if any meaningful elimination of barriers to intra-regional trade is to occur. As previously outlined, the rules of origin in SADC in an annex to the SADC protocol on trade set out the rules of origin used to determine which goods are eligible for preferential treatment as ‘originating goods’. The rules set out two criteria upon which they can be considered as such. The first categorises goods that have been wholly produced in any member state while the other

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<sup>189</sup> See Omondi, George. 2010. “*Origin rules row denies firms free EAC access*”, Business Daily, 7 July 2010. Available at <http://www.businessdailyafrica.com/Company%20Industry/Origin%20rules%20row%20denies%20firms%20free%20EAC%20access/-/539550/953418/-/471rl4/-/>; accessed on September 28 2014

<sup>190</sup> Rules Manual, para 1.2

categorises goods that ‘have been obtained in any member state incorporating materials which have not been wholly produced there, provided that such materials have undergone sufficient working or processing in any member state within the meaning of paragraph 2 of this Rule.’<sup>191</sup>,

Paragraph 2 as stated in the above provision moves on to articulate further conditions to be fulfilled by these products. This rather more complex application of the rules of origin by the SADC region does not make things easy for traders and business people in their cross border trading activities. Consequently this stands as a barrier to intra-regional trade as the traders would be deterred from applying these rules to benefit from a lower tariff classification.

#### 4.5 **Impact on Trade**

During the earlier years of the EAC (up until 1971) the treaty of the EAC was successful in restoring relatively free intra-regional trade. However, the EAC then experienced a decline in its trade volumes<sup>192</sup>. This was perhaps owing to the institutional set up of the older EAC bloc. As previously outlined, Kenya was strategically positioned to reap the majority of the benefits of this earlier regional integration initiative. Moreover, the economies of Uganda and Tanzania at the time relied heavily on agricultural products whilst Kenya had a growing and more competitive industrial sector. The over dependence on agriculture for the smaller economies of Uganda and Tanzania further made the benefits of regional integration unclear. The unequal distribution of benefits illustrated that the regional integration does not benefit all its members in all circumstances.

There was little scope to add value in terms of products or operational efficiency from mutual trade and cooperation between member states. As such intra-regional trade although encouraged by this earlier attempt at regional integration was not as successful as was envisaged. However, the treaty of the EAC at the time had minor success in addressing these trade issues in the region. The treaty addressed the inequality of the regional economies which lead to a decay of the protectionist policies of the large Kenyan

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<sup>191</sup> SADC Protocol on Trade, Annex I, Rule 2(1)(b)

<sup>192</sup> Eliawony J. Kisanga, *Industrial and Trade Cooperation in Eastern and Southern Africa*, (1991) at pg. 104

industries and the rise of similar industries in Uganda and Tanzania. This was largely based on the transfer tax system<sup>193</sup>.

It follows that this for a long time, there remained a strong trade imbalance in the region in favor of Kenya. In 2005 before the effects of the customs union could have had any meaningful reflection on trade in the region, Kenya's trade exports to the EAC comprised of 25.6% of its overall exports. The percentage for Tanzania was 7.9% whilst Uganda's stood at 13.4%<sup>194</sup>. In spite of this there remained a notable impact from the earlier EAC. During the period from 1990 up until 2004, there was an overall trade increase in the region by about 400%<sup>195</sup>. However, this may be attributed to the co-operation agreements which the countries of the region had entered into prior to the signing of the Arusha treaty.

In light of the foregoing, the establishment of the current EAC customs union has had a tremendous and far-reaching impact on trade within this region. Total intra EAC trade more than doubled growing from approximately US\$1.61 million in 2006 to approximately US\$ 3.8 million in 2010<sup>196</sup> a total increase of 96%. Intra-regional trade in the EAC further rose to 23 per cent of the total value of exports in 2011. It was the highest increase in African regional economic blocs. Other estimates placed the growth trend in the value of intra-EAC trade to have more than doubled from US\$ 2 billion in 2005 to over US\$ 5 billion in 2013<sup>197</sup>.

Similarly, the total inflow of foreign direct investment in the EAC region increased from US\$1.3 billion in 2006 to US\$1.7 billion in 2009<sup>198</sup>. This foreign direct investment has mainly occurred in the manufacturing sectors across the EAC region which has ultimately enabled the rapid industrialisation of the region's economies. It follows that although the EAC has had some challenges in implementing the common external tariff,

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<sup>193</sup> Eliawony J. Kisanga, *Industrial and Trade Cooperation in Eastern and Southern Africa*, (1991) at pg. 101

<sup>194</sup> Wolfe Braude, *Regional Integration in Africa; Lessons from the East African Community* (2008), at pg. 57

<sup>195</sup> EAC Statistics database: Data from partner states (2005)

<sup>196</sup> Peter N Kiguta, Investment and Trade in the EAC: Progress and Priorities, a presentation on the EAC after 10 years presented February (2012) see

[http://www.eac.int/news/index.php?option=com\\_docman&task=doc\\_view&gid=272&Itemid=78](http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=272&Itemid=78) Accessed on 06/30/2015

<sup>197</sup> See <http://allafrica.com/stories/201409090350.html> accessed on October 11 2014

<sup>198</sup> Grail Research, The East African Community: It's time for Businesses to take Note, January (2012) at pg. 12

eliminating internal tariffs among other things, it has been largely successful in the attempt to regionally integrate its economies. It is perhaps for this reason that the EAC was rated as one of the fastest growing and reforming economies in the world, according to the doing business report 2012<sup>199</sup> and is consistently placed as one of the most successful regional integration attempts in Africa. Ultimately, other African regional economic blocs particularly SADC may draw lessons from the achievements attained by the EAC in dealing with the barriers to their own integration initiatives.

#### 4.6 **Conclusion**

From the outset, it is clear to see that the approaches of SADC and the EAC are different. Although SADC was originally established to reduce economic dependence on South Africa as SADCC, the current EAC was an attempt to build upon the successes of the failure of the past integration strategies whilst learning from the past failures.

Diverging practices and differences in the mechanics of the two organisations further become apparent in the way the organizations structures operate. The council in the EAC is able to issue directives and regulations which become directly enforceable. Essentially, policies and programs aimed at promoting intra-regional trade are able to have a first hand and immediate effect upon traders as they are able to invoke those policies to ensure lower tariff classifications, among other benefits. There is no similar provision in the mechanics of the SADC treaty and the trade protocol. This is consolidated by the fact that the EAC has the support of the court in applying and interpreting these provisions.

The structure of the EAC appears to reflect and respect the idea of separation of powers. While the summit gives the general direction on policy in the EAC, other organs are able to enact and create binding decisions affecting integration and ultimately intra-regional trade. The same cannot be said for SADC. There is no provision for the council within SADC making directly binding decisions as the summit remains the supreme body within the institution. SADC has thus far failed to create an independent supranational institution whose aim is to purely promote trade within the region. Most poignantly, the

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<sup>199</sup> See <http://www.thecitizen.co.tz/News/Intra-EAC-trade-highest-in-African-economic-groups/-/1840392/1876740/-/1yfupbz/-/index.html> accessed on October 2 2014

organisation has serious flaws in its institutional set up. This was evident with the disbanding of the tribunal. Moreover, while the EAC provides for little or no derogations from treaty and customs union protocols, SADC still allows derogations from providing preferential trade agreements to third parties. Member states are not acting illegally if they maintain agreements with non-SADC countries. This in turn gravely undermines the growth of intra-regional trade.

In light of this, it is not surprising that the EAC has been said to be one of the most successful REC's in Africa. The EAC is now at the stage of a common market with initiatives towards creating a monetary union in progress<sup>200</sup>. In doing so, the EAC has managed to significantly improve its intra-regional trade. It is the region with the highest percentage of intra-regional trade in Africa. The share of intra-EAC exports in the region's total exports increased from 18.7% in 2000 to 20.8% in 2010 while the share of total intra-SADC exports in the region's total exports stood at 15.3% in 2000 and 18% in 2010<sup>201</sup>. Ultimately, SADC might draw some lessons from the EAC in improving intra-regional trade not only in areas where there is a lacuna in the trade protocol and institutional flaws cumbersome to trade in the region.

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<sup>200</sup> See <http://www.ipppmedia.com/frontend/?l=61095> accessed on October 12 2014

<sup>201</sup> See Wusheng Yu, *Trends of Trade Flows of Countries in the EAC and SADC Regions and Perspectives for the Tripartite Free Trade Area*, June (2012) at pg. 1 – 2

## CHAPTER FIVE

### Conclusion: The Way Forward for SADC

#### 5.1 Introduction

This chapter will seek to summarize and conclude the gaps and shortfalls within the SADC protocol on trade. It will also make some suggestions on the way forward.

#### 5.2 Conclusions

The discussion in this thesis identified certain provisions of the trade protocol which undermine its objectives as outlined in article 2. The protocol lays good foundation for promoting intra-regional trade which has seen total exports in merchandise from the region to the rest of the world grow from \$14 billion in 2000 to \$58 billion in 2011.<sup>202</sup> Despite this, total intra-SADC trade declined from \$46.6 billion to \$38.8 billion during the same period.<sup>203</sup> Certain provisions in the protocol combined with NTB's throughout the region contribute to this haphazard impact on trade within the SADC region. Consequently, the gaps within the trade protocol ultimately limit the attainment of the objectives of the protocol and consequently the goals of SADC as a whole.

The derogation provisions outlined in article 9 of the protocol remain vague, broad and open to abuse. It was highlighted that the derogation provisions leave room for abuse by member states which in turn makes them a non-tariff barrier to trade. The derogations are in practice used by member states to fulfill domestic interests which often contradict the interest of promoting intra-regional trade<sup>204</sup>. The domestic interests largely appear to promote protectionist measures which hinder intra-SADC trade. This was illustrated through the Tanzania and Zimbabwe paper industries case where such exemptions were invoked and subsequently led to a substantial decrease in trade within these sectors.

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<sup>202</sup> SADC Statistics Yearbook, *Intra-SADC Trade for SADC* (2011) available at <http://www.sadc.int/information-services/sadc-statistics/sadc-statiyearbook/>

<sup>203</sup> SADC Statistics Yearbook, *Intra-SADC Trade for SADC* (2011) available at <http://www.sadc.int/information-services/sadc-statistics/sadc-statiyearbook/>

<sup>204</sup> Frank Flatters, *The SADC Trade Protocol: Impacts, Issues and the Way Ahead* (2001) at pg. 4

On the other hand, the provisions allowing the maintenance of preferential trade agreements with third party states largely undermine the goal of attaining a free-trade area within SADC and ultimately a customs union. The trade protocol allows SADC member states to maintain preferential trade agreements with third party states as long as they are more advantageous than any SADC provision. This provision is inherently prohibitive of the objectives of the protocol to create a customs union. The protocol must aim to be the most advantageous instrument of trade to any SADC member state rather than conceding this to other agreements with non-member states. The trade protocol could have adequately addressed this through a prohibition provision, stopping member states from entering into such agreements with non-members. This is further compounded by the lack of a harmonised external tariff structure for the SADC states.

The SADC protocol on trade should have illuminated a coherent and harmonised external tariff policy for its member states. Currently different interests and considerations exist in terms of the goals and aims of each member states tariff implementation. While most SADC states use tariffs as a form of income, South Africa utilizes tariff as a way to protect its local industries from external competition.<sup>205</sup> This is naturally inconsistent with promotion of intra-regional trade as well as inconsistent with the goals of regional economic integration. Consequently, although the SADC trade protocol has enabled intra-regional trade to grow, the growth attained has not been consistent or far-reaching to make substantial contribution to development in this region.

Moreover, the provisions relating to the rules of origin in the SADC trade protocol and further amendments remain extremely complicated. The double-transformation rules enacted by the protocol and subsequent amendments are innately a barrier to intra-regional trade. Traders are unable to utilize the preferential trade agreements to apply to their products. The rules become cumbersome to apply which deters traders from receiving the benefits of the SADC trade protocol. This was most effectively highlighted through the mechanics of the textiles industries within the SADC region.

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<sup>205</sup> Adwell Zembele, *Achieving Deeper Integration in Southern Africa: The Case of SADC Customs Union* (2012)

### 5.3 **The Way Forward**

In light of the above concerns and of the approach taken by the EAC which had similar challenges in that region, some changes must be made to the SADC protocol on trade to consolidate the gains made in promoting intra-SADC trade as well as to further promote it. Although SADC aims to create a customs union and a common external tariff, the trade protocol must be amended to specifically enunciate the creation of this. The EAC managed to achieve this with their Customs Union Protocol and SADC must also take the same approach by having express provisions within the protocol on trade. Particular attention must be paid to the establishment of the tripartite free-trade area between SADC, the EAC and the Common Market for Eastern and Southern Africa (COMESA).

The interests of SADC within this tri-partite FTA would be protected through the provisions of the trade protocol. This would be especially effective if SADC included express provisions dealing with and establishing a common external tariff and eliminating the provision within the protocol which allows member states to enter into third party agreements so long as they are more beneficial. This would have a far-reaching effect in addressing the pressing issue of dual membership in RECs.

Moreover, the rules of origin need to be amended to be made simpler and more practical for traders within the SADC region. Inspiration could be drawn from the rules of origin as encompassed within the Customs Union Protocol of the EAC. This would be beneficial in eliminating barriers to trade as well as promoting intra-regional trade.

Perhaps the most far-reaching consideration that SADC must address lies within the issues surrounding NTB's. These involve a wide range of issues which are constantly evolving and changing. Monitoring policies and mechanisms need to be established through an amendment of the trade protocol. Within the EAC this was dealt with through such measures as online reporting of NTB's by traders to frequent reports by bodies within the organisation.

Ultimately, for the SADC protocol on trade to be able to have a substantial effect on intra-regional trade and integration as a whole, SADC must also give broader considerations to issues outside the protocol. Particular focus must be given to the role of



an independent judicial body which stakeholders in regional trade can access to be able to invoke the benefits of the protocol on trade.

The SADC Tribunal was disbanded through the controversial Campbell case which involved the contentious land grabbing issues in Zimbabwe. It was successfully argued by Zimbabwe that the Tribunal's decision in the case was an infringement of its sovereignty. Although the Tribunal was reinstated by a decision of the Summit, its protocol only allowed for inter-state cases to be brought for adjudication.<sup>206</sup> This is a significant barrier to trade as citizens within SADC are unable to invoke and enforce the provisions of the protocol against those who are acting contrary to the protocol. The direct effect application of the protocol would in itself promote regional intra-regional trade.

On the whole, SADC remains on the right track in order to achieving its stated goals of economic integration. The instruments and institutions of SADC must remain flexible and evolve to accommodate and respond to the continuous challenges of trade. Ultimately, the SADC Protocol on Trade lay's a good foundation for its stated objectives. However there are challenges posed by specific provisions within the Protocol. It is imperative for SADC to address these challenges by amending the Protocol to ensure that its objectives are met.

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<sup>206</sup> See [www.bdlive.co.za/africa/africannews/2014/08/20/sadc-tribunal-back-with-mandate-reduced-to-interstate-cases](http://www.bdlive.co.za/africa/africannews/2014/08/20/sadc-tribunal-back-with-mandate-reduced-to-interstate-cases) accessed on March 19th 2015

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